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CONVEYANCER'S NOTEBOOK

COSTS OF LEASES ACT, 1958

The Costs of Leases Act, 1958, received the Royal Assent on July 23 and came into force on that date. It must be one of the shortest Acts on the Statute book, and the operative section, section 1, provides: "Notwithstanding any custom to the contrary, a party to a lease shall, unless the parties thereto agree otherwise in writing, be under no obligation to pay the whole or any part of any other party's solicitor's costs of the lease." By section 2 "lease" includes an underlease and an agreement for a lease, underlease, tenancy or sub-tenancy; and "costs" includes fees, charges, disbursements (including stamp duty), expenses and remuneration. The Act was promoted by the Law Society. Whether the fact that the Act was not opposed in its passage indicates that the big landlords accept the change remains to be seen.

Although, on the face of it, the Act merely changes the normal practice as to the incidence of costs, there is much more to it than that. The position before the Act was that, in the absence of contrary agreement or custom, the lessee bore the lessor's solicitor's costs. If nothing was said and the lease in fact granted, the lessor would pay his solicitor and was entitled to sue the lessee. The costs of obtaining a licence to grant the lease whether from a superior lessor or a mortgagee were not, however, included in the costs for which the lessee was liable: *Law Society's Digest*, vol. 1, Opinion 304. (Incidentally, the lessor's solicitor is entitled to charge for his work in obtaining the licence in addition to the scale fee: *op. cit.*, Opinion 1098.) Technically, the lessee was not liable for the cost of the counterpart or the stamp duty thereon: *Re Negus*

[1855] 1 Ch. 23; though the practice of the profession has been otherwise.

The lessor's scale fee covers "preparing, settling and completing lease, and counterpart." As between lessor and lessee, the obligation to stamp the lease fell on the lessor's solicitor (*Law Society's Digest*, vol. 1, Opinion 1050), but not the obligation to have it stamped under the Finance Act, 1931 (*op. cit.*, Opinion 1190). The disparity between the work of the lessor's solicitor and that of the lessee's solicitor is reflected in the scale, though today the lessee's solicitor often has to do a good deal by way of local land charge searches, etc., and there is little doubt that leases represent some of the least remunerative conveyancing business. It would not be entirely desirable that lease and counterpart should be engrossed in different offices, but at least it would be reasonable for the lessee to pay for part of the engrossment. The lessee will now have to do his own stamping, as he is not paying the lessor his solicitor's costs and the liability under the Stamp Act, 1891, is placed on the lessee: section 15.

In the case of short tenancy agreements, strictly the lessor's solicitor is entitled to the full scale fee (*Re Negus, supra*; *Re Gray* [1901] 1 Ch. 239), but it has not been the practice to charge it except in the case of agricultural tenancies, which are in a special category. Usually the tenant of residential premises pays something towards the landlord's costs. Often, he does not employ his own solicitor and the costs are borne in equal shares. In future, it will certainly be advisable in all cases to specify the tenant's liability in the tenancy agreement, so that he will be aware of it as soon as the draft is submitted.

As many leases today are granted pursuant to, or under the sanction of, the Landlord and Tenant Act, 1954, the lessee will be able in many cases to resist attempts to put the lessor's solicitor's costs upon his shoulders, and where an option to renew has already been granted the lessee will be entitled to his new lease without paying the lessor's solicitor's costs unless the option specifically otherwise provides. It seems probable, therefore, that the Act will effectively cause a change in practice, but the matter can hardly be left there. If the old rule worked a hardship on the tenant, the new rule leads to an inequality of burden which is even more pronounced where the same solicitor acts for both parties. The lessee's bill is then only one-quarter the size of the lessor's and how can the solicitor properly advise the lessor to transfer any part of his burden onto the lessee's shoulders or the lessee to accept it? The only equitable solution is for the lessor's and lessee's scales to be

approximately the same, each side doing his own engrossing. In practice the lessor's solicitors could engross both parts and the lessee's solicitor pay for the engrossment of one part.

Finally, it seems clear from the wording of the Act that, if the lessee in fact pays the lessor's solicitor's costs under whatever mistake or pressure, he cannot recover them back.

Estate Agents' Commission

With effect from August 1, the scale of estate agents' commission on sale authorised by the principal professional bodies was increased. The scale is now 5 per cent. on the first £500 (instead of £300), 2½ per cent. on the next £4,500 (instead of £4,700) and 1½ per cent. on the excess above £5,000. This means that on sales for £500 or more the commission is increased by £5.

Matrimonial Proceedings (Children) Act, 1958

Parliament has passed no fewer than four Acts dealing with matrimonial and analogous subjects this session: The Matrimonial Causes (Property and Maintenance) Act, the Maintenance Orders Act, the Divorce (Insanity and Desertion) Act and the Matrimonial Proceedings (Children) Act. The first is dealt with elsewhere in this issue (*post*, p. 383). The second makes provision for facilitating the enforcement of maintenance orders and introduces enforcement by attachment of earnings. The third is rather outside our scope, but attention may here be drawn to the last-named. The Act received the Royal Assent on July 7, 1958, and comes into force on a day to be appointed by the Lord Chancellor.

Part I of the Act (ss. 1 to 6) applies to England and Wales. Section 26 of the Matrimonial Causes Act, 1950, which enables the High Court to provide for the custody, maintenance and education of the children of parties to matrimonial proceedings, is, by section 1 of the new Act, extended to a child of one party to the marriage (*i.e.*, a child by a former marriage, an illegitimate child of the wife or a child adopted by one of the parties only) who has been accepted "as one of the family"—an intelligent and intelligible phrase—by the other party. The court is to have regard to the extent to which the other party has assumed responsibility for the child's maintenance and to the liability of any third party to maintain the child. The section does not apply to proceedings instituted before the commencement of the Act.

Section 2 supplements section 26 of the Matrimonial Causes Act, 1950, generally. The jurisdiction of the court over children in matrimonial proceedings has been steadily made more effective in

recent years and this tendency is underlined. In the case of matrimonial proceedings instituted after the passing of the Act, the court is not, in general, to make a decree of divorce or nullity absolute or pronounce a decree of judicial separation until it is satisfied, in respect of every child coming within section 26 (as amended by section 1 of the new Act) who is under sixteen years of age, that satisfactory arrangements or the best which can be devised in the circumstances have been made or that it is impracticable to make any such arrangements. The general rule will not apply where delay is undesirable, but the court will then require undertakings to bring the question of the arrangements for children before the court within a specified time. Section 3 gives the court power in proceedings instituted after the commencement of the Act to deal with children where a petition is dismissed at any time after the trial has begun.

Section 4 recognises the efficacy of maintenance orders in favour of children instead of the mother and extends the jurisdiction under the Matrimonial Causes Act, 1950, s. 23 (1) (wilful neglect to maintain), to enable the court to make orders for payment to the children or a third party instead of to the wife.

Solus Agreements

Precedents of commercial agreements are principally to be found in the files of solicitors' offices all over the country and it is extremely difficult to obtain much assistance from the standard textbooks. The practitioner has learned not to ignore assistance from most unlikely sources and for those concerned for clients who sell, or are contemplating selling, petrol the short notes entitled "Exclusive Trading at Service Stations" issued by the Motor Accessories Manufacturers Association, Ltd., of 67 Grosvenor Street, London, W.1., will be found helpful.

The best account of the post-war internecine struggle between the petroleum companies to make as many service stations as possible tied stations is to be found in *Bolam* v. *Regent Oil Co., Ltd.* (1956) 37 T.C. 56. In order to persuade retailers to become tied, the big companies hold out various inducements and the question arose whether the amounts paid to various retailers to improve their stations were properly deductible against revenue for tax purposes. Danckwerts J., affirming the decision of the Commissioners, held that they were. In *Atlantic Refining Company of South Africa* v. *C. I. R.* [1957] 2 S.A.L.R. 330, the South African Appellate Division, on a somewhat analogous point, concerning losses on loans made by petroleum companies to service

station proprietors under tied agreements, held that the losses were capital losses. The petroleum companies are seeking to get tighter and tighter control over the retailers and, where a retailer is thinking of entering into a tied agreement, his attention might well be drawn to the fact that there is some considerable variation between the controls exercised by the different companies.

The notes issued by the Association give some indication of some of the main types of agreements in force and what amendments may be expected. This method of tying seems to be completely outside the system of legal control of monopolies, but is potentially capable of just as extensive a mischief.

Building Contracts and Insurance

In the case of building contracts, the contractor is usually put under an obligation to insure against every conceivable type of claim. *Gold* v. *Patman & Fotheringham, Ltd.* [1958] 1 W.L.R. 697 (C.A.) may serve as a warning that such insurance clauses should be looked at carefully. The contract was in the standard R.I.B.A. form under which the contractor (i) undertakes liability for damage or injury caused by the negligence, omission or default of himself, his servants and agents and sub-contractors, and (ii) must insure as provided by the bills of quantity. The bills of quantity specified everything the draftsman could think of, some of them more than once under different descriptions, but did not include specifically the liability for damage to third parties by the owner *qua* owner. The contractors' piling operations caused a subsidence to adjoining property. The contractors' operations were conducted without fault and the adjoining owner made a claim against the owner of the property on which the operations were being carried out. It was held that the contractors were not liable to the employing owner as the operations were concluded without fault and their obligation to insure against subsidence and collapse did not extend to the liability of the owner *qua* owner.

Trustee Investments

The range of investments authorised for trustees by section 1 of the Trustee Act, 1925, has been extended by section 54 of the Local Government Act, 1958. Trustees may now lend money to certain authorities if it is charged on the revenues of the authorities, or may purchase securities created for borrowing money so charged; the authorities referred to include any local authority, the City Corporation, any metropolitan borough council, any parish council and some other bodies such as river boards and the Metropolitan

Water Board. Except in the case of stocks created by the London County Council, the Metropolitan Water Board and the Belfast City and District Water Commissioners, the limitation in the proviso to section 2 (1) of the Trustee Act, 1925, is applied, so as to prohibit investment at a price exceeding 15 per cent. above the redemption value or, within fifteen years prior to liability for redemption, at any price above the redemption value.

STANDARD LEASE CLAUSES

In the last issue on page 249 we drew attention to the use of standard lease clauses. Our readers may be interested in Form 25, *post*, p. 760, supplied by Messrs. Woodcock & Sons, illustrating the practical application of a standard form of lease.

THE CONTROL OF BORROWING—AN ADDENDUM

By Gerald Dworkin, ll.b., Solicitor

On July 3, 1958, a welcome change in the economic policy of the Government brought about some limited but important relaxations in the control of borrowing.

The principal change is to raise from £10,000 to £50,000 the limit of the total value of transactions, which, together with the value of all previous transactions carried out by the same person in the previous twelve months, are exempt from restriction. This restores the position that was in force from 1947 until March, 1956 (*a*).

The duties of the Capital Issues Committee have been re-defined in full for the first time since 1951 in a letter of July 1, 1958, from the Chancellor of the Exchequer to the Chairman of the Capital Issues Committee (*b*). This letter should be read for guidance whenever it is intended to make an application to the Capital Issues Committee.

The changes made to the law were contained in the Control of Borrowing (Amendment) Order, 1958 (*c*), which added yet another Order to the complexity of this branch of the law, although itself repealing a 1956 Order (*d*). Shortly after it came into operation complaints were made that the Control of Borrowing Order, 1947, and the five amending instruments to it had become " an impenetrable mass of deletions and additions." In the House of Lords, the Marquess of Lansdowne acknowledged that the Order had reached such a state of complexity that it was extremely difficult to discover the current state of the law. The outcome of this was a new Control of Borrowing Order, 1958 (*e*), the principal effect of which was to consolidate the Control of Borrowing Order, 1947, and its amending Orders. Thus, there has been a slight relief, since

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(*a*) The article on " The Control of Borrowing " at p. 189, *ante*, is affected very little by the new changes, save that the amounts will now be different. However, many persons who were previously concerned with Treasury control on a £10,000 limit may not now be concerned with an increase to a £50,000 limit. Thus the reasoning of the article may now be used for larger businesses and larger transactions.

(*b*) See *Hansard*, Vol. 590, No. 134, col. 1605.

(*c*) S.I. 1958, No. 1097.

(*d*) S.I. 1956, No. 358.

(*e*) S.I. 1958, No. 1208.

it is now only necessary to resort to the complications of the 1958 Order (*f*) and the 1946 Act to ascertain the legal position (*g*).

The principal amendments to the law which were made by the Control of Borrowing (Amendment) Order, 1958, are as follows:

Relaxing provisions

1. *Consent-free borrowing.* As from July 4, 1958, the limit of the total value of transactions, which, together with the value of all previous transactions carried out by the same person in the previous twelve months, are exempt from restriction, has been raised from £10,000 to £50,000. The change also means that consent is now required where the total consideration for the issue of shares exceeds £50,000 and not £10,000.

2. *Capitalisation of reserves.* Consent is no longer required when a company issues securities for the capitalisation of profits or reserves. However, consent is still required to issue any redeemable shares if the purposes or effects of the transaction consist of or include the capitalisation of profits or reserves (*h*).

Thus, apart from the issue of redeemable securities to capitalise reserves, scrip issues are no longer subject to Treasury control. It would appear that the exception of redeemable securities is to prevent tax (especially surtax) avoidance by capitalising profits and then issuing, for example, a preference share capable of being redeemed almost immediately.

Restricting provisions

Certain classes of transaction have now been brought under control which had largely been exempted by the Control of Borrowing (Amendment) Order, 1955 (*i*). The 1955 Order was designed to exclude from control transactions, such as those between associated companies, by which no new money was raised. However, ways had been found of using these exemptions to raise new money. In a letter to the Chairman of the Capital Issues Committee, the Chancellor of the Exchequer stated:

> " . . . the Order has been amended to prevent new money from being raised outside the control by artificial devices. The

(*f*) By a printer's error in the Control of Borrowing Order, 1958, article 4 (1) referred to " paid shares " instead of " partly paid shares." This serious mistake was quickly remedied by the printing of an erratum slip substituting " issue partly paid shares " for " issue paid shares." Thus the 1958 consolidating Order has already inadvertently produced an excrescence!

(*g*) All future references will, for clarity, be to the Control of Borrowing Order, 1958, unless otherwise stated.

(*h*) Article 4 (6).

(*i*) S.I. 1955, No. 530.

object of the Capital Issues Control is to regulate the raising of new money: and following this principle, in April, 1955, the Treasury amended the Order to exempt from control certain classes of capital operations which for the most part did not involve raising new money, in order to free normal commercial transactions from restrictions. Unfortunately, this relaxation has been abused and the exempt operations have been adapted to raise large sums of new money for undertakings which have been refused or would have been refused permission to borrow. As long as the control of borrowing is retained, it must be made effective, and I see no alternative but to restore statutory control over the classes of transactions that were exempted three years ago. I regret the inconvenience to legitimate business transactions, but I know I can rely on the Capital Issues Committee to recommend consent to such transactions with the minimum of inquiry and delay, and to concentrate their critical attention on the transactions that are really devices for raising new money."

The following types of transaction are now brought within the references to the borrowing of money in article 2 and within Treasury control:

(1) *Company operations which have the same effect as if property were charged by way of mortgage*

(a) Transactions in which property is charged to secure sums payable to a holding company by its subsidiary, or vice versa.

(b) Transactions in which an undertaking is sold to a company and the price of the undertaking remains unpaid and is charged on *any* property.

(c) Transactions in which the price of property remains unpaid and is charged on *other* property.

(Previously it was possible to avoid the necessity of applying for Treasury consent by allowing the unpaid purchase price in a transaction to be secured on property other than that which had just been purchased.)

(d) Transactions in which a company issues for any purpose any securities other than shares, unless the securities are issued for the sole purpose of securing money borrowed from a bank in the ordinary course of the company's business, or unless they are certain securities issued in exchange for other redeemable securities of the company (*k*).

(*k*) Articles 4 (7) and 4 (8).

(2) *The acquisition by companies, in return for the issue of shares, of realisable assets*

A frequent method of evading Treasury control was for companies to issue fully paid shares in consideration of either the undertaking of another company, or the shares in another company, or the assets of another company in circumstances in which the assets of the other company consisted largely of cash or of securities that could readily be sold for cash. This was countered by the following types of transaction being brought within the scope of the order:

(a) Transactions in which money is raised by the issue of shares by a company other than a private company to the vendors of an undertaking.

Article 3 (3) previously exempted from control this type of transaction effected by any body corporate, but now the exemption only relates to private companies. Article 3 (3) reads:

> "This article shall not apply to money raised by the issue by a *private company* of shares to the vendors or the nominees of the vendors of any undertaking sold to the company if—
>
> (a) the shares are all fully paid; and
>
> (b) the money raised is cash forming part of the assets of the undertaking or cash which has been paid to the vendors as, or as part of, the purchase price of the undertaking."

Sub-paragraph (b) takes into account a commonly adopted business method of escaping the requirements of section 52 of the Companies Act, 1948, which provides that where shares are allotted for a consideration other than cash, then within one month of allotment either (i) a properly stamped contract constituting the title of the allottees, or (ii) if such contract has not been reduced to writing, particulars of such contract stamped in a manner appropriate to a contract must be filed with the Registrar of Companies. However, if the business is sold by an oral contract for cash and then (by exchanging cheques) using the cash to subscribe for shares, there is no necessity for the filing of a contract (*l*).

(b) Transactions in which money is raised by the issue of shares to a holding company by its subsidiary.

(c) Transactions in which the assets of an undertaking are sold to a company (other than a private company) and shares are issued by the company in consideration of the transfer of the assets.

(*l*) *Spargoe's Case* (1873) L.R. 8 Ch. 407.

(d) Transactions in which shares are issued by a company as consideration for the securities of another company.

These provisions bring within the scope of Treasury control for bodies corporate, other than private companies, the type of transaction envisaged in *London and Country Commercial Properties Investments, Ltd.* v. *Att.-Gen.* (*m*). In that case company A proposed to carry out a transaction whereby land was to be purchased from company B in consideration of the issue to company B of fully paid shares and debenture stock of company A. The *ratio decidendi* of the case was that the proposed arrangement was not a transaction whereby the price of any property was allowed to remain unpaid within the meaning of article 2 (1) (b) of the Control of Borrowing Order, 1947. It followed that, as the law then was, no Treasury consent was needed for this type of dealing. As previously mentioned, it became fairly common practice, in order to raise money, for a company A to purchase, by the issue of fully paid shares, company B (with " cash-only " assets) or the realisable assets of company B, the latter company often having been specially created for the purpose. Now all these types of transaction come within the scope of the Order (*n*).

(3) *The issue of shares in satisfaction of debts*

(a) Transactions in which money is raised by the issue of shares by a company to a person to whom money borrowed by the company is owing is now brought within Treasury control.

This takes into account the case where a body corporate borrowed money temporarily without security and then converted such borrowings into permanent capital by the issue of shares in satisfaction of the indebtedness.

(b) Transactions in which a body corporate issues shares in satisfaction of any indebtedness by the body corporate in respect of any money borrowed in a manner which was exempt under article 2 (1) (*o*).

A consolidating order governing the whole of control of borrowing is a welcome step, and does make the law a little easier to find (even though not to interpret). So long as the Borrowing (Control and Guarantees) Act, 1946, remains in the Statute-book, however, it will be necessary to tread very warily in all large borrowing transactions.

(*m*) [1953] 1 W.L.R. 312.

(*n*) Articles 3 (3); 3 (4); 4 (2) (a); 4 (2) (b).

(*o*) *i.e.*, those cases where the consent of the Treasury to borrowing is exempted in the first instance, see pp. 191 *et seq*.

THE LANDLORD AND TENANT (TEMPORARY PROVISIONS) ACT, 1958

By V. G. Wellings, m.a.(oxon), Barrister-at-Law

1. The Purpose and Scheme of the Act

The Landlord and Tenant (Temporary Provisions) Act, 1958, another Act in the Rent Act series (*a*), became law on August 1, 1958. The purpose of the new Act is to mitigate in appropriate cases the hardships which tenants of houses decontrolled by rateable value may experience upon the determination on or after October 6, 1958, of the "standstill period" provided for in the Fourth Schedule to the Rent Act, 1957. The scheme of the Act of 1958 is broadly as follows:

(1) to require landlords of persons entitled to standstill protection, who do not leave voluntarily when that protection comes to an end, to enlist the aid of the court in order to evict them;

(2) to give to the court in certain specified circumstances power to grant to such persons limited security of tenure in the shape of suspensions of execution of orders for possession;

(3) to provide means of ascertaining the rent and other terms applicable both during the period between the ending of standstill protection and the making of an order for possession and during the suspension of such order.

2. When the Act Applies

The Act of 1958 does not apply unless each of the following conditions is fulfilled (Act of 1958, s. 1):

(1) the dwelling-house (*b*) must have been decontrolled by rateable value under section 11 (1) of the Act of 1957, its rateable

(*a*) Though, no doubt, not the last in that series.

(*b*) The dwelling-house in question may, as under the Rent Acts, be a house or a flat or part only of a larger "dwelling-house." That expression, in the Act of 1958, has two definitions: (i) section 5 (1) which says that "dwelling-house" has the same meaning as in the Act of 1957; and (ii) section 1 (4) which says that any reference in the Act of 1958 to a dwelling-house to which that Act applies includes a reference to any part of a dwelling-house, being a part to which the Act applies. In the Act of 1957 there is no specific definition of "dwelling-house" but the meaning of that expression, where used in that Act, is clearly the same as in the Acts of 1920 to 1939, *viz.*, a house let as a separate dwelling or a part of a house being a part so let. It would seem, therefore, that the "dwelling-house" to which the 1958 Act applies is the same dwelling-house, whether it be a whole house or merely a part thereof, as that which was decontrolled. Provision is, however, made in the Act of 1958 to deal with the case where, after the Act has applied to a dwelling-house, the occupier ceases to occupy part of it: see § 4, *infra*.

value on November 7, 1956, exceeding £40 in London or £30 elsewhere in England and Wales;

(2) notice (*viz.*, in Form S) must have been served on the "tenant" (*c*) by the landlord under paragraph 2 of the Fourth Schedule to the Act of 1957; it does not matter whether the notice was served before or after the commencement (August 1, 1958) of the Act of 1958 (Act of 1958, s. 1 (2));

(3) until the date of termination (October 6, 1958, or later date) specified in the Form S notice, possession of the dwelling-house must have been retained by a person entitled to retain such possession by virtue of paragraph 2 (or of an election under paragraph 9) of the Fourth Schedule to the Act of 1957 (Act of 1958, ss. 1 (2), 5 (2)). Such person may have been a contractual tenant or statutory tenant or statutory successor by analogy with section 12 (1) (g) of the Act of 1920: see Act of 1957, Fourth Schedule, paragraphs 2 (1), 14, and Act of 1958, s. 1 (2);

(4) the Act of 1958 must not have ceased to apply to the dwelling-house (see § 4, *infra*). If the Act ceases to apply to part only of a dwelling-house, the Act will continue to apply to the residue of it: see § 4, *infra*.

3. "The Occupier"

The person who retains possession of the dwelling-house until the date of termination specified in the Form S notice is, if until that date he is entitled to retain possession by virtue of paragraph 2 (or 9) of the Fourth Schedule to the Act of 1957, known in the Act of 1958 as "the occupier." In the event of the death of that person "the occupier" means any person who, by virtue of section 12 (1) (g) of the Act of 1920, would have been qualified to retain possession of the dwelling-house if the Rent Acts had not ceased to apply to it (Act of 1958, s. 1 (2)). Thus, if on July 6, 1957, a decontrolled dwelling-house was occupied by a statutory tenant (not by transmission under s. 12 (1) (g)) who died before the Form S notice has taken effect, his widow residing with him at his death will be entitled to the benefit of standstill protection until the notice takes effect (1957 Act, 4th Sched., para. 14); if still residing

(*c*) At the date when the Form S notice is served on him the person entitled to standstill protection is, unless he is a contractual tenant, properly speaking not a tenant at all—he is not even a statutory tenant, albeit that he has the same rights as if he were a statutory tenant. But "tenant" cannot have been intended to be confined to contractual tenants only: see the definitions of "tenant" and "statutory tenant" in s. 49 (1) of the Housing Repairs and Rents Act, 1954, which definitions are applied (via s. 25 (1) of the Act of 1957) by the definition of "tenant" in s. 5 (1) of the Act of 1958. See also the definition of "occupier," *infra*.

in the dwelling-house on that date she will be "the occupier" (1958 Act, s. 1 (2)). If the statutory tenant's death takes place after the Form S notice has taken effect his widow, if residing with him at his death, will become "the occupier." But when the widow in her turn dies, their son or daughter cannot become "the occupier" and will not have the benefit of the Act of 1958 (because the principle of transmission under s. 12 (1) (g) can operate once only). Where part of a decontrolled dwelling-house is itself a decontrolled dwelling-house, there may be two "occupiers," one of the whole house and one of the part (but see § 4, *infra*).

4. When the 1958 Act Ceases to Apply

The Act is to continue in force until August 1, 1961, and is then to expire (s. 5 (5)). Apart from this, section 1 (3) provides that if the occupier (*d*) of a dwelling-house (*e*), to which the Act of 1958 applies:

(a) ceases to retain possession of the dwelling-house or any part of the dwelling-house; or

(b) retains possession of the dwelling-house or any part of the dwelling-house as tenant under a tenancy (whether granted before or after the application of the 1958 Act to the dwelling-house) not expiring, or terminable by notice to quit given by the landlord, earlier than three years from its commencement (*f*),

the Act is to cease to apply to the dwelling-house or to that part of the dwelling-house, as the case may be. Section 1 (3) then goes on to say that, without prejudice to the provision set out under head (b), *supra*, the Act is not to apply to a dwelling-house or any part of a dwelling-house during any period during which the occupier is entitled to possession of the dwelling-house or of that part of the dwelling-house as tenant under any tenancy granted by the owner. The expression "owner" means the person who, as against the occupier, is entitled to possession of the dwelling-house (Act of 1958, s. 5 (1)). The meaning of section 1 (3) in a case where the occupier retains possession of the dwelling-house (or part) after the date of termination specified in the Form S notice seems to be that the Act is ousted once and for all if on

(*d*) As defined above.

(*e*) See footnote (*b*), *supra*.

(*f*) Where the new tenancy relates to the whole of the decontrolled dwelling-house and was granted before the 1958 Act applied to the dwelling-house (*i.e.*, before the date of termination specified in the Form S notice) this provision is unnecessary because the right to retain possession under the standstill provision will have ceased with the commencement of the tenancy (see 1957 Act. 4th Sched., para. 4), so that the 1958 Act will never have applied at all.

or after that date the occupier has a contractual right to retain possession under a tenancy for a term certain of three years or more from its commencement; but that in the case of any other contractual tenancy (express or implied) the Act is ousted only so long as the contractual right endures and when that contractual right ceases (by effluxion of time or notice to quit, as the case may be) the application of the Act to the dwelling-house (or part) will be resumed. To take an example which until recently was topical: suppose that the date of termination specified in the Form S notice is October 6, 1958, and that on and after that date the occupier is in possession under an agreement made on January 6, 1958, for a three years' tenancy, the commencement of which was backdated to July 6, 1957: the agreement will not have been effective under paragraph 4 of the Fourth Schedule to the Act of 1957 to oust standstill protection; the term granted is, in effect, one of two and a half years from January 6, 1958, and the Act of 1958 will begin to operate in respect of the dwelling-house when that term ceases on July 6, 1960.

As to head (a), *supra*, the Act may possibly intend that if the occupier at any time physically or personally ceases to occupy the dwelling-house (or part) he thereby " ceases to retain possession." This would mean that an occupier who goes to hospital even for a short period would lose his protection. It is noteworthy that section 15 (1) of the Act of 1920 uses the words " retain possession " and it is therefore likely that the courts will apply a test similar to that evolved to determine whether a statutory tenant has abandoned his statutory rights. Thus, a short absence from the dwelling-house (or part) will not deprive an occupier of his rights under the 1958 Act but a prolonged absence will cast upon him the onus of proving (i) that he has an intention to return to the dwelling-house (or part) as his house, and (ii) that he has clothed that intention with a *corpus possessionis* (*g*).

A test of this kind must, of course, be applied with regard to realities and probabilities. Thus, in a case where part of a decontrolled dwelling-house is itself a decontrolled dwelling-house, it may be totally unrealistic to say that A, " the occupier " of the whole dwelling-house intends to return to the part, of which B, his former subtenant, is " the occupier "; at all events the function of B's occupation is not to preserve the part for A's ultimate return to it. In cases of this kind it would seem that, so far as A is concerned, the Act of 1958 never, in practice, applies to the part

(*g*) Such as by leaving his furniture or a caretaker in the dwelling-house (or part) with the function of preserving his ultimate homecoming (or return to that part): see *Brown* v. *Brash* [1948] 2 K.B. 247.

occupied by B. Indeed, any other result would cause difficulties in the working of the Act and, in particular, in ascertaining the person entitled to possession (see § 5, *infra*) and the person to whom B, as "the occupier" of the part, owes rent (see § 6, *infra*).

5. Restrictions upon Recovery of Possession

So long as the Act of 1958 applies to a dwelling-house (or any part of it (*h*)) it is not lawful for the owner of the dwelling-house to enforce against the occupier, otherwise than by proceedings in a court of competent jurisdiction, the right to recover possession of the dwelling-house (or that part): see section 1 (1). Any person who contravenes this provision is, without prejudice to any liability or remedy to which he may be subject in civil proceedings, liable on summary conviction to a fine not exceeding £100 or to imprisonment for a term not exceeding six months, or both (*ibid.*). The word "owner" is defined (s. 5 (1)) as meaning the person who, as against the occupier, is entitled to possession of the dwelling-house. In the second of the two examples given in § 4, *supra*, if A is protected under the Act of 1958 in respect of the whole dwelling-house notwithstanding that B, his former subtenant, is "the occupier" protected under the Act in respect of the part, then A is, in relation to B, the "owner"; if, so far as A is concerned, the Act does not apply to the part, then the person who is "owner" as against A is also "owner" as against B.

The expression "court of competent jurisdiction" is not defined in the Act but must mean the High Court, subject to the restrictions on costs contained in section 17 (2) of the Act of 1920 (*i*), the magistrates' court (*k*) and, in general, the county court.

If the owner, against the will of the occupier, retakes possession of the dwelling-house without an order of the court, not only will he commit the offence described above, but also will, it is thought, be liable in an action at the suit of the tenant to pay damages (*l*) and, possibly, to have an order for possession (*m*) or injunction (*n*) made against him.

The owner, in commencing proceedings for possession, will be exercising a common law right with which the Act of 1958 does not interfere. The owner will be entitled to an order for possession as of right and the court will have no discretion but to grant it. The owner

(*h*) See s. 1 (3) (4) and § 4, *supra*.
(*i*) Applied by the 1958 Act, s. 4 (1): see § 12, *infra*.
(*k*) In cases within the scope of the Small Tenements Recovery Act, 1838.
(*l*) Compare *Cruise* v. *Terrell* [1922] 1 K.B. 664; *Lavender* v. *Betts* [1942] 2 All E.R. 72; *Perera* v. *Vandiyar* [1953] 1 W.L.R. 672.
(*m*) Compare *Denman* v. *Brise* [1949] 1 K.B. 22.
(*n*) Compare *Remon* v. *City of London Real Property Co.* [1921] 1 K.B. 49.

can, after the date of termination specified in the Form S notice has expired, commence proceedings without serving any further notice (*o*) and without proof of any of the statutory grounds applicable to Rent Acts cases (*p*). The effect of the 1958 Act is thus not to interfere with the making of an order for possession but to give the court jurisdiction to interfere with the *execution* of it when made.

6. Rights and Duties of the Occupier

(1) General rights and duties

So long as the Act of 1958 applies to a dwelling-house, the occupier is, with certain exceptions, required to observe and is entitled to the benefit of all the terms and conditions of the relevant tenancy (*q*) to which he was subject and entitled immediately before the date of termination specified in the Form S notice (Act of 1958, s. 2 (1)). The exceptions relate to the rent payable under the relevant tenancy and to any right which the tenant may have had thereunder to sublet. The rent which is to be payable during the period of holding over is considered in sub-§ (3) and § 7 (5), *infra*. Provision, with regard to subletting, is found in section 2 (4) which states that nothing in section 2 is to be construed as conferring on the occupier of the dwelling-house any estate or interest therein or any power to create such an estate or interest, nor as affecting the right of the owner, subject to any other provision of the Act (*r*), to recover possession of the dwelling-house at any time without notice or further notice to quit.

"*Relevant tenancy.*" This expression means (s. 5 (1)):

(a) Where, on July 5, 1957, the dwelling-house was the subject of a statutory tenancy, the original contract of tenancy referred to in section 15 of the Act of 1920, *i.e.*, the contractual tenancy upon the determination of which the statutory tenancy arose (*s*);

(b) Where, on July 5, 1957, the dwelling-house was the subject of a controlled tenancy not being a statutory tenancy (*i.e.*, was the subject of a contractual tenancy), that tenancy.

(*o*) 1958 Act, s. 2 (4).

(*p*) If such grounds exist it may, however, be advantageous to rely on them: see s. 3 (6) and § 7, *infra*.

(*q*) Defined *infra*.

(*r*) *i.e.*, presumably, subject to the provisions restricting the owner's right to possession without reference to the court and conferring on the court power to suspend execution of orders for possession.

(*s*) If, on July 5, 1957, there was a statutory tenancy originating under s. 12 (1) (g) of the Act of 1920, during the subsistence of a contractual tenancy, the "relevant tenancy" will be that tenancy: see *Moodie* v. *Hosegood* [1952] A.C. 61.

The date chosen (July 5, 1957) was the day immediately preceding the commencement of the Act of 1957. It was not possible for the draftsman to define "relevant tenancy" as the contractual tenancy governing the statutory tenancy under which the occupier (or his predecessor) originally held because, by virtue of decontrol, no statutory tenancy in the case of head (b), above, ever arose (see the 1957 Act, s. 11 (1)).

(2) Services and furniture

For the purposes of section 2 (1) the relevant tenancy is treated as including a term requiring the landlord to provide for the tenant any services which were ordinarily provided for him by the landlord or a superior landlord before April 2, 1958. This provision puts services in fact supplied by the landlord or superior landlord on the same footing as services which, under the relevant tenancy, were contractually supplied. There is no corresponding provision with regard to furniture and none is necessary since some part of the rent payable under the relevant tenancy will ordinarily be treated as having been attributable to furniture in fact supplied (*t*) so that the right to the use of such furniture would be treated as one of the terms or conditions of the relevant tenancy.

Offence. It is not lawful for the owner of a dwelling-house to which the 1958 Act applies to withhold or withdraw from the occupier, without reasonable cause, any services to which, or any furniture to the use of which, the occupier is, for the time being, entitled under section 2 (1) of the Act (1958 Act, s. 1 (1)). Any person who contravenes this provision is, without prejudice to any liability or remedy to which he may be subject in civil proceedings (*u*), liable, on summary conviction, to a fine not exceeding £100 or to imprisonment for a term not exceeding six months, or both (1958 Act, s. 1 (1)).

(3) Rent

The rent payable during the period of holding over under the 1958 Act depends on whether stay of execution of an order for possession has been ordered. The rent payable when an order has been made and suspended is discussed in § 8, *infra*. Where no suspension has been ordered the rent payable in respect of any rental period (*a*) or part of a rental period is, notwithstanding

(*t*) See *Seabrook* v. *Mervyn* [1947] 1 All E.R. 295.

(*u*) Consider the observations concerning the corresponding provision relating to recovery of possession without court order: see § 5, *supra*.

(*a*) This expression has the same meaning as in s. 25 (1) of the Act of 1957, *viz.*, "a period in respect of which a payment for rent falls to be made" (Act of 1958, s. 5 (1)).

anything in the terms and conditions of the relevant tenancy, and subject to the provisions as to the last controlled rent and apportionment discussed below, to be a rent of which the annual rate is equal to the aggregate of:

(a) the 1956 gross value (*b*) multiplied by two;

(b) the annual amount, ascertained in accordance with the Second Schedule to the Act of 1957, of any rates (*c*) in respect of the dwelling-house for the rental period for which the rent is payable which are borne by the owner or a superior landlord;

(c) such annual charge as may be reasonable for any services provided for the occupier during that rental period, being services provided in pursuance of section 2 (see sub-§ (2), *supra*), and for any furniture which, by virtue of section 2 (see sub-§ (2), *supra*), the occupier is entitled to use during that period;

and (without prejudice to the liability of any person in respect of any other damage or dilapidations) the occupier is treated as exclusively responsible for all internal decorative repairs, and the owner is exclusively responsible for all other repairs, being in each case repairs required to make good damage or dilapidations occurring during the application of the Act to the dwelling-house (1958 Act, s. 2 (2)). Thus, if under the relevant tenancy the tenant (and, therefore, during the holding over, the occupier) is liable for some repairs other than internal decorative repairs, there will be no reduction in the multiplier. In fact, the multiplier is invariably to be two. Since no provision is made either for variation of the multiplier or for reduction of the rent in case of disrepair, it is difficult to understand why it was thought necessary in section 2 (2) to say anything about repairs at all unless it is intended to make the occupier and the owner actually *liable* (*d*) for the repairs for which they are deemed to be responsible. Indeed, in the opinion of the writer, this is the intention of section 2 (2). The liability of either occupier or owner in this respect can, therefore, be enforced by action. The owner's liability will, however, depend, it is thought, on notice of the defects in question first having been given to the owner (*e*). The provisions of the relevant tenancy with regard to repairs or obligations are to be ignored as between the occupier and owner during the period of holding over under

(*b*) Defined as in the 1957 Act, s. 25 (1) and 5th Sched., Part 2 (1958 Act, s. 5 (1)).

(*c*) Defined as in the 1957 Act (1958 Act, s. 5 (1)).

(*d*) Contrast *Morgan* v. *Liverpool Corporation* [1927] 2 K.B. 131.

(*e*) See *Morgan* v. *Liverpool Corporation*, *supra*, and Woodfall (25th ed.), pp. 768, 769.

the Act of 1958. The remedies of the occupier and owner under the relevant tenancy for dilapidations occurring before the application of the Act of 1958 are, however, preserved: this is the effect of the words "without prejudice to the liability of any person in respect of any other damage or dilapidations."

Questions as to services and furniture. Any question what charge is reasonable for services or furniture under the above provision is to be determined by agreement in writing between the owner and the occupier, and in default of such agreement by the county court (s. 2 (3)).

(4) Last controlled rent in excess of rent ascertained as above

A proviso to section 2 (2) of the Act of 1958 contains a saving (relating to the old recoverable rent) corresponding to that applicable to the rent limit ascertained under section 1 of the Act of 1957. Where the rent recoverable for the last controlled rental period (*f*) exceeds the rent which would have been payable for that period when ascertained under the provision discussed in sub-§ (3), *supra*, the rent to be paid by the occupier until an order for possession is suspended is to be at the rate of the rent recoverable for the last controlled rental period, subject to the same increases or reductions (if any) for adjustments in rates, services and furniture as would be required to be made in the rent limit under section 3 or section 4 of the Act of 1957 if the Rent Acts (*g*) had not ceased to apply to the dwelling-house and if the last controlled period were the basic rental period within the meaning of that Act.

Repairs. When the rent is ascertained under the above-mentioned proviso by reference to the last controlled rent the provisions of section 2 (2) with regard to responsibility for repairs (discussed in sub-§ (3), *supra*) do not apply and, during the period of holding over under the Act of 1958, the repairing obligations of owner and occupier will be those contained in the relevant tenancy.

(5) Apportionment

Section 1 (4) of the Act of 1958 provides that any reference in that Act to a dwelling-house to which that Act applies includes a reference to any part of a dwelling-house, being a part to which that Act applies; but the rent to be paid under section 2 of that Act in respect of any such part is to be the proper proportion

(*f*) "Last controlled rental period" means the last rental period ending before the date specified in the Form S notice (Act of 1958, s. 5 (1)). "Rental period" has the same meaning as in the 1957 Act (*ibid.*).

(*g*) *i.e.*, the Acts of 1920–1939, as amended: Act of 1958, s. 5 (1), (2).

(as determined by agreement in writing between the owner and the occupier, or in default of such agreement by the county court) of the rent which would be payable under that section if this Act applied to the whole of the dwelling-house. Thus, if the occupier on the date specified in the Form S notice was entitled under the Act of 1958 to retain possession of the whole of the decontrolled dwelling-house but subsequently ceases to retain possession of part of it, the rent payable in respect of the part retained by him will be an apportioned part of the rent which would have been payable in respect of the whole if the whole had remained subject to the 1958 Act. But it is to be doubted whether apportionment is intended in a case where the part is itself a decontrolled dwelling-house, because, in this case, the part is the " dwelling-house " to which the Act of 1958 applies. Where an apportionment of the 1956 gross value is necessary this is already catered for in section 25 (1) of the Act of 1957, which provision is applied by section 5 (1) of the Act of 1958.

(6) To whom rent is payable

During the period of holding over under the Act of 1958 the occupier will owe his rent to the owner, that is to say, the person who, as against the occupier, is entitled to possession of the dwelling-house. Where a decontrolled dwelling-house contains a part which is itself a decontrolled dwelling-house and the whole and the part each has its own occupier the occupier of the whole will be entitled to possession and, therefore, to rent from the occupier of the part unless the part, so far as the occupier of the whole is concerned, is regarded as being excluded from the ambit of the 1958 Act: see the last part of § 4, *supra*, and view there expressed.

(7) Terms as to repairs

See sub-§§ (3) and (4), *supra*, where this subject is discussed.

7. Suspension of Execution of Orders for Possession

(1) Jurisdiction to suspend

As has been stated in § 5, *supra*, the Act of 1958 does not interfere with the owner's common law right to seek an order for possession from the court and the court indeed has no discretion but to make the order sought. But the court is given jurisdiction in certain specified circumstances to suspend such an order when made. Subject to the exceptions discussed in sub-§§ (3) and (4), *infra*, section 3 (1) of the Act provides that if in proceedings by

the owner against the occupier for the recovery of a dwelling-house to which the Act applies the occupier satisfies the court that certain grounds exist the court is to suspend the execution of any order for possession made in the proceedings. The grounds, *each one* of which must be satisfied, are as follows:

(a) that the occupier has not unreasonably refused or failed to accept any proposal made by the owner for the grant of a new tenancy of the premises, being a tenancy for a term of not less than three years and not being a tenancy to be granted at a premium (*h*) or requiring the payment of increased rent in respect of any period before the date on which the proposal was made; in considering whether any refusal or failure to accept any such proposal was reasonable regard is to be had, among other things, to the means of the occupier (*i*), to his age, and to any disability to which he may be subject, and, in particular, to the terms of the proposal relating to repairs, improvements or maintenance (s. 3 (3)). This suggests that the reasonableness of the occupier's refusal or failure to accept is to be judged, not so much by what is reasonable for the owner to ask for the premises, but rather by what is reasonable for the occupier to offer in respect of them;

(b) that he has failed, after making such efforts as were reasonable in the circumstances, to obtain other appropriate accommodation. Again, the means of the occupier (*i*), his age, and any disability to which he may be subject, are relevant (s. 3 (3));

(c) that all rent due in respect of the period from the date specified in the Form S notice, or, in so far as the amount of the rent payable in respect of that period has not been determined, a reasonable sum in respect of that rent, has been paid or tendered to the owner. Here the court has, however, a discretion: the court can, if it thinks fit, grant a suspension notwithstanding that any such rent or reasonable sum has not been paid or tendered provided that any such suspension is granted subject to the payment of the amount outstanding within twenty-eight days (s. 3 (5));

(d) that having regard to all the circumstances of the case greater hardship would be caused by making an order for

(*h*) "Premium" has a similar definition to that in the Landlord and Tenant (Rent Control) Act, 1949, s. 18, and "includes any fine or like sum or any other pecuniary consideration in addition to rent."

(*i*) Including the means of any members of his family residing with him who have contributed or might reasonably be expected to contribute to the expenses of the household (s. 3 (7)).

possession without such suspension of execution as is provided by the section than by granting such suspension.

(2) Duration of the suspension

When the court is satisfied that all the grounds set out above are satisfied the court has, subject to the exceptions discussed in sub-§§ (3) and (4), *infra*, no discretion but to suspend the order. But the court has a complete discretion as to the length of suspension ordered provided that it is not less than three months or more than nine months from the date of the order for possession (1958 Act, s. 3 (1)). The court's power of suspension under section 3 of the Act is expressly without prejudice to any such power which the court has under the general law (*k*).

(3) When the court must not suspend

If the court is satisfied (i) that an agreement for the sale of, or for the grant of a tenancy of, the dwelling-house is in force under which the owner is obliged to give vacant possession of the dwelling-house on a date specified therein, (ii) that the purchaser or tenant requires the dwelling-house for his own occupation or for occupation by any son or daughter of his over eighteen years of age, or by his father or mother, and (iii) that the agreement or a memorandum or note thereof was signed by or on behalf of the owner before April 2, 1958, no suspension of execution is to be granted *under the Act* (*l*) beyond the time at which the owner is obliged to give vacant possession under the agreement (1958 Act, s. 3 (6)).

(4) When the court has a discretion to refuse or revoke suspension

In any case where, if the Rent Acts had not ceased to apply to the dwelling-house, the court would have had power to make an order for the recovery of possession by the owner, the court may refuse to grant any suspension of execution, or revoke any such suspension already granted, as the case may be (1958 Act, s. 3 (6) (b)). Thus, for example, if the occupier has been guilty of nuisance or annoyance to adjoining occupiers or has broken or not performed an obligation of the relevant tenancy, the court, provided that it would be reasonable to make an order, can, in its discretion, refuse a suspension or revoke a suspension previously granted.

(*k*) *i.e.*, on the average, about a month: see *Sheffield Corporation* v. *Luxford* [1929] 2 K.B. 180; *Jones* v. *Savery* [1951] 1 All E.R. 820; *Air Ministry* v. *Harris* [1951] 2 All E.R. 862.

(*l*) The court's power under the general law is not affected: see sub-§ (2) and footnote (*k*), *supra*.

8. Rent and Other Terms during Suspension

(1) Rent

During any period of suspension granted under section 3, section 2 (2) of the Act of 1958 does not apply (except so far as that subsection relates to responsibility for repairs) but the rent payable during suspension is nevertheless to be, at the minimum, the rent ascertained in accordance with that subsection and its proviso (discussed in § 6 (3) and (4), *supra*), subject to adjustments for variations in rates, services or furniture. Section 3 (2) of the Act of 1958 enacts that the rent to be paid by the occupier in respect of any rental period or part of a rental period falling within the period of suspension is to be at such rate as may be specified in the order, being the rate demanded by the owner or, if the court is satisfied that a rent so demanded would be beyond the means of the occupier (*m*), such lower rate as appears to the court to be within his means, not being less than the rate at which rent was payable immediately before the beginning of the period of suspension. A proviso to section 3 (2) says that the rent payable under that subsection is to be subject to the same increases or reductions (if any) in respect of variations in rates, services and furniture, as would be required to be made in the rent limit under section 3 or section 4 of the Act of 1957 if the Rent Acts had not ceased to apply to the dwelling-house and if the rental period comprising the date of the order were the basic rental period within the meaning of that Act.

(2) Repairs

It seems that responsibility of owner and occupier for repairs will be in accordance with section 2 (2) of the Act (see § 6 (3), *supra*) where the rent payable immediately before suspension was calculated by reference to twice the 1956 gross value, and in accordance with the terms of the relevant tenancy where that rent was calculated by reference to the last controlled rent (see § 6 (4), *supra*).

(3) Other terms

The other terms and conditions applicable during suspension continue to be those applicable before suspension: see § 6 (1), *supra*.

(*m*) Including the means of any members of his family residing with him who have contributed or who might reasonably be expected to contribute to the expenses of the household (s. 3 (7)).

9. Further Suspensions and Variation of Orders

Where the execution of an order has been suspended under section 3 for any period the court may (subject to the matters discussed in § 7 (3) and (4), *supra*), upon application made by the occupier *not less* than twenty-eight *clear* days before the expiration of that period, or, with the leave of the court, at any subsequent time within that period, and upon being satisfied that the conditions specified in grounds (a) to (d) (see § 7 (1), *supra*) continue to be fulfilled, suspend the execution for such further period, not exceeding six months at any one time, as the court thinks fit (s. 3 (4)). The power to grant further suspensions is therefore discretionary. Where an application for a further suspension has been duly made the execution of the order is in any case treated as suspended while that application is pending (s. 3 (4)). Having regard to the opening words (*n*) of section 3 (2) it would seem that the court, when granting further suspensions, is not bound by its order as to rent on the initial suspension but, if the occupier can afford to pay it and the owner demands it, may order a higher rent to be paid. Further, the court has power, upon application made by the owner or the occupier at any time and upon being satisfied that the circumstances by reference to which the rent specified in any order for suspension was determined have substantially changed since the order was made, to vary the order so far as it specifies that rent (s. 3 (4) (b)).

10. Effect on Suspensions of Expiration of Act

When the Act of 1958 expires on August 1, 1961, any order for suspension of execution then in force is to continue in force and may be revoked as if the Act had not expired (1958 Act, s. 5 (5)).

11. Should the Owner Bother?

Where an owner has made no proposal for a three years' tenancy it will not be difficult for the average occupier in areas where housing accommodation is scarce to show that he is entitled to a suspension, more particularly where the owner is a limited company (*o*). Will landlords find it worth while, therefore, to seek orders for possession? The answer would seem to be: Yes. Although occupiers generally may expect the first suspension to be for the full period of nine months and may then possibly expect a further

(*n*) "In relation to any period for which the execution of an order for possession is suspended under this section."

(*o*) With the result that the greater hardship almost invariably must be on the occupier if no suspension is ordered.

suspension (possibly for three months), the general experience may be for the suspensions in the aggregate not to exceed one year. This, of course, is a matter of guesswork and in determining whether in any particular case it is worth while seeking an order for possession much must depend, quite frankly, on a knowledge of one's judge!

What will happen if an owner takes no action at all? In this event the occupier will continue holding under the Act on the terms discussed in § 6, *supra*. The acceptance of rent from him will not convert him into a contractual tenant unless the rent accepted is wholly disparate from the rent laid down in the Act. Even if the occupier does become a contractual tenant in this way his tenancy will readily be determinable by notice to quit, upon the expiration of which the Act of 1958, if still in force, will apply again to the dwelling-house: see § 4, *supra*. When an order for possession has been granted and suspended, and rent continues to be accepted after the last suspension has ceased, any contractual tenancy thereby created can, of course, be determined and an order for possession obtained free from any restrictions either under the 1958 Act or at all.

12. Jurisdiction of County Court and Costs

For the purposes of section 17 (2) of the 1920 Act, which is applied by the 1958 Act, any claim for the recovery of possession of a dwelling-house to which the Act of 1958 applies is treated as though it were a claim arising under the Acts (Act of 1958, s. 4 (1)). If such a claim is brought in the High Court the owner can obtain no order for costs even if an order for possession is made without any suspension. If, however, the owner is willing to forgo his costs it may be worth his while to go in the High Court because by so doing he will be able to obtain summary judgment under Order XIV, with the result that any suspension granted will begin considerably earlier than, having regard to the delay to be expected in the county court, would be the case if the claim were brought in that court. In forgoing his costs in this way the owner may not be forgoing very much, as section 4 (2) indicates. That subsection deprives even the county court of power to make an order for costs in proceedings, for the recovery of possession of a dwelling-house in which a suspension of execution is granted or refused under section 3 of the Act of 1958 (*p*). There are, however, two exceptions:

(a) where a suspension of execution is refused or revoked in pursuance of section 3 (6) (b): see § 7 (4), *supra*;

(*p*) Including any application arising out of the grant of such suspension.

(b) where it appears to the court, having regard to the conduct of the parties respectively in and in connection with the proceedings, that there are special reasons for the making of an order for costs.

13. Rules of Court

The Rent Restrictions (Amendment) Rules, 1958, amend the 1957 Rules to cater for proceedings or applications under the 1958 Act. The most important amendment is contained in the new Rule 5 which:

(a) empowers a plaintiff to an action for possession to serve on a defendant 7 days' notice requiring him to inform the plaintiff and the registrar not later than four days before the hearing whether the defendant proposes to apply to the court for a suspension of execution of any order for possession which the court may make; nothing is said as to what is to happen if the defendant fails to comply with the notice;

(b) empowers the court, if it thinks fit, to hear the proceedings or any part thereof in private (this presumably is designed to appease the minds of occupiers and members of their families who are compelled to reveal details of their incomes).

14. Minor Provisions

For reasons of space the following provisions have not been considered in this article:

section 4 (3): power of local authorities to provide information for occupiers and owners as to their rights and duties.

section 4 (4): effect of the Act on controlled mortgages.

section 5 (4): application of Interpretation Act, 1889; upon its expiration Act of 1958 to be treated as though repealed by another Act.

THE FINANCE ACT, 1958—A SUMMARY

By David R. Stanford, Barrister-at-Law

The new Finance Act forms a patchwork quilt the final appearance of which is somewhat difficult to reconcile with the neatness of the plan laid down in the Chancellor's budget statement. Some of the odd wording of the original Bill has been removed, additional and unheralded changes in the law have been added during the course of the passage through Parliament, but clarity is unfortunately not in general the keynote. An official " concession " to right an estate duty anomaly was announced on the Second Reading, but not incorporated in the law: can it be that the art of expressing the law clearly and adequately is so lost that the vague phraseology of a Parliamentary statement not subject to the scrutiny of the courts is necessary?

Of the numerous matters dealt with in the Act, those thought to be of greatest interest to subscribers to *The Conveyancer* in their professional capacities must occupy the main space in this article. For the record, however, other matters are noted briefly, many being of considerable interest to any subscriber as an individual.

Purchase Tax

The first section and the first two Schedules bring about a simplification and general reduction of purchase tax. Only four rates of tax are now in operation—60, 30, 15 and 5 per cent.—and the Second Schedule codifies in Part I thereof chargeable and exempt goods. Section 2 clarifies the position of local authorities and other non-commercial bodies, whose activities are henceforth to be treated in the same way for the purposes of purchase tax as the activities of commercial bodies.

Customs and Excise

Part II of the Act, in which the sun shines almost throughout, commences with the reduction of entertainments duty in section 3, giving considerable relief to cinemas, and simplifies the collection of duty, providing for a single method of payment on the basis of weekly returns. Sections 4 and 5, together with the Third and Fourth Schedules respectively, bring about welcome reductions in the duties on imported and home-produced wines, including, it

may be noted, mead, the effect of which has already been gratifyingly apparent to those with discerning palates. Some consolidation of the law relating to wine duties is also effected. Methyl alcohol ceases to be subject to the duties on spirits. The Financial Secretary to H.M. Treasury warned the House of Commons that it is still an offence to offer methyl alcohol as a beverage, although the German chemist reputed to have discovered a method of removing its toxicity without impairing its effects either failed to make such discovery, or died without disclosing it!

Section 7 paves the way for a more elastic system of road vehicle licences of greater convenience to the motorist and causing less congestion in the administration than the previous system, which was tied to the calendar year. The fixed period of the licence runs from the beginning of the month in which the licence first has effect. An intriguing dilemma of the motorist has been sorted out by section 8; when compulsory tests are essential under sections 1 and 2 of the Road Traffic Act, 1956, taking an untested car to be tested or bringing a car away from the test when it has failed, might have proved impossible without committing an offence; now no licence will be required where the vehicle is so used, or where a "failed test" vehicle is delivered to or collected from the repairer. The use of trade licences for the collection and delivery of road vehicles by the use of another road vehicle is restricted by section 9.

Finally, Part II provides in section 10 for extension to September 30, 1958, of the latest date for the surrender by a dealer of pensioners' tobacco relief tokens and section 11 foreshadows changes in dog licence rates by preventing a reverter of the duty to the Crown from local authorities on a change of the rate of duty.

Income Tax

Sections 12 and 13 leave income tax and surtax chargeable at the same rates as last year and only small changes are made in the personal reliefs by section 14. This latter section affects the dependent relative relief granted by Income Tax Act, 1952, s. 216, the old age relief granted by section 211 of that Act, and the further old age exemption introduced in last year's Finance Act: these matters are discussed further below.

Section 15 causes the increase of certain initial allowances. The section applies to expenditure incurred (not deemed to have been incurred (*a*) after April 15, 1948), but not expenditure such as

(*a*) Income Tax Act, 1952, ss. 265 (4) and (6) and 279 (2).

already attracts a two-fifths allowance (*b*). Capital expenditure on industrial buildings and structures brings an initial allowance under Chapter I of Part X of Income Tax Act, 1952, equal to three twentieths of the expenditure (*c*). Chapter II of Part X will now provide an initial allowance in respect of expenditure on machinery and plant of three tenths of the expenditure (*d*). The investment allowance in respect of certain fuel economy expenditure preserved from extinction in 1956 (*e*) may by election of the taxpayer have substituted for it an initial allowance under Chapter I or Chapter II of Part X as above. Finally, the initial allowance in respect of dredging (*f*) is increased from one tenth to three twentieths of the expenditure.

Although no general rewording of the expenses rule under Schedule E has yet taken place, section 16 makes a minor inroad by the allowance as expenses, subject to stringent safeguards, of certain fees, contributions and subscriptions to professional bodies and other societies; this allowance is discussed further below.

The anomalous position whereby certain charities and other institutions including the Church lost relief from tax under Schedule A in respect of property occupied by persons having a modest, but not wholly derisory, income is righted by section 17 (*g*). The same section repeals the stringent provision in Income Tax Act, 1952, s. 479 (3), whereby the annual value of a dwelling-house occupied rent free by a minister of religion by virtue of his office could be treated as earned income of the minister, although not his income, and so benefit the person paying the Schedule A tax, but not the minister. We next find sections 18 and 19 concerned with the Revenue's efforts to counteract loss of revenue by the practice known as dividend stripping. This delicate art, first attacked in Finance (No. 2) Act, 1955, and the net now cast by the legislature contain too many variations to be adequately discussed save in an article devoted solely thereto and the writer hopes that the omission of his views will be excused by such devotees as scan these pages. Before passing on to matters of more general interest, comment may be made on the widely publicised and successful fight to prevent these sections being made retrospective in operation. Although mercy was thus shown to those who entered into transactions in the light of warnings

(*b*) Expenditure on the provision of a ship; Income Tax Act, 1952, s. 279 (5); Finance Act, 1953, s. 16 (5); Finance Act, 1958, s. 15 (6).

(*c*) Finance Act, 1958, s. 15 (1).

(*d*) *Ibid.*, s. 15 (2).

(*e*) Finance Act, 1956, s. 15 (3).

(*f*) *Ibid.*, s. 17.

(*g*) Income Tax Act, 1952, s. 103 (1) (c); s. 448 (1) (a) and (b); Finance Act, 1958, s. 16.

(however vague) as to the prospect of retrospective highly penal legislation, the length and thunder of the fight allowed the following sections, also retrospective in operation, unheralded by any official or unofficial warning, to slide gently onto the Statute-book. The merits of those now caught by sections 21 and 22, who are all persons who were merely avoiding being artificially penalised by having to pay tax at a rate other than that applicable to themselves, may be compared with the merits of many a dividend stripper gaining the benefit of tax paid by someone else at the expense only of the Revenue. At least equal consideration might, it is submitted, have been expected!

Sections 20 to 22 amend the law relating to taxation of settlements contained in Part XVIII of Income Tax Act, 1952, and are discussed at length below. Two of those sections were introduced at a late stage into the Finance Bill and such a course must be deplored. The matters affected concern mainly the family settlement, which is in many cases entered into for purposes divorced entirely from tax considerations. Such settlements have long been a target for artificial "deeming" provisions in taxing statutes, treating one man's income as that of another: now it would appear that no such settlement can be entered into with knowledge of its tax effect, even for one year, between Budget Day and the passing of the annual Finance Act.

Section 23 and the Sixth Schedule extend the time limits for appeals and claims for relief. Time limits for appeals, hitherto less than thirty days, are increased to thirty days. For reliefs and elections of various kinds, the limit is now six years in general or two years where the taxpayer is given a choice of reliefs. Section 24 provides for the first time a penalty for submitting incorrect accounts. If, however, a person discovers that accounts submitted in connection with the ascertainment of his liability to income tax are incorrect and he submits a statement rectifying the accounts, no proceedings may be taken against him under the new section by reference to the incorrect accounts. It will further be a defence for a person proceeded against to prove that the accounts were submitted without his consent or concurrence.

Personal reliefs

The dependent relative relief is available to a claimant who maintains an incapacitated relative of himself or his wife, or his or his wife's widowed mother. The total income of the person maintained has previously needed to be less than £165 per annum for any relief to be claimed. If the dependant's income exceeded £105 per annum, the full relief, namely tax on £60, was reducible,

as is also the case where there is more than one claimant (*h*). These two income limits are now raised to £195 per annum and £135 per annum respectively (*i*).

The old age relief is claimable where the claimant, or his wife who is living with him, was over the age of 65 at any time in the year of assessment in question. In such a case where his total income was not more than £700 he was entitled to a deduction of tax equal to the standard rate on two ninths of that income (*k*) as an alternative to earned income relief (*l*). The limit of £700 raised from £600 last year has now been further raised to £800 (*m*). Marginal relief is available in the case where the total income slightly exceeds £800 and operates as heretofore. In such case the taxpayer may claim that his tax liability be reduced to the tax which he would have paid had his total income been £800 plus three fifths of the excess of his total income over £800. It must be borne in mind, however, that total exemption may be available to a person otherwise qualifying for old age relief under the further old age exemption considered in the next paragraph.

Finance Act, 1957, s. 13, introduced a new relief, deemed to be a new section in Part VIII of the Income Tax Act, 1952, for a claimant showing that at any time within the year of assessment, either he or his wife living with him was of the age of 65 years or more. In such case if his total income did not exceed £250 he was to be exempt from income tax. The figure of £250 is now raised to £275 (*n*). Further, if the claimant was a married man whose wife was living with him or was wholly maintained by him during the year of assessment (he not being entitled in computing his income for income tax purposes to make any deduction for sums paid for the maintenance of his wife) he was exempt from income tax if his total income did not exceed £400. When the wife is not living with her husband, however, he must qualify as to age himself and cannot rely upon his wife's advanced years. The figure of £400 is also raised by the new Act, in this case to £440 (*n*). With the increase in basic figures for the exemption limits, a corresponding increase is made in the gap for marginal relief (*o*). The marginal relief (granted by restricting tax chargeable to the amount payable without the exemption or

(*h*) Income Tax Act, 1952, s. 216 as amended by Finance Act, 1953, s. 14 (3) and Finance Act, 1955, s. 2 (6).
(*i*) Finance Act, 1958, s. 14 (3).
(*k*) Income Tax Act, 1952, s. 211 (2) as amended by Finance Act, 1952, s. 14 (5); Finance Act, 1953, s. 14 (1); Finance Act, 1957, s. 12 (2).
(*l*) Income Tax Act, 1952, s. 211 (4).
(*m*) Finance Act, 1958, s. 14 (2).
(*n*) Finance Act, 1958, s. 14 (1) (a).
(*o*) Finance Act, 1958, s. 14 (1) (b).

one half of the excess of the claimant's income over the relevant limit, whichever is the less) is now available for a claimant with income up to £55 in excess of the relevant limit, as against the original £50.

Deductions from emoluments assessed to tax

Certain fees, contributions and subscriptions to professional bodies and other societies may now be deducted from the emoluments of any office or employment assessed to tax. The fees and contributions qualifying are those payable in respect of the retention of a name in certain registers, namely of architects, dentists, a class of ancillary dental workers, ophthalmic opticians, dispensing opticians, or pharmaceutical chemists and the annual fees payable by a registered patent agent or by a registered veterinary surgeon or person registered in the supplementary veterinary register and the fee and contribution to compensation fund or guaranteed fund payable on issue of a solicitor's practising certificate (*p*).

A subscription to qualify must be annual and be paid to a body of persons approved by the C.I.R., which approval is to be given (there being a right of appeal (*q*) to the Special Commissioners and thence to the High Court) on application by the body concerned. Approval, once given, may be withdrawn subject to appeal. Such approval will be given to a body of persons not mainly of a local character, whose activities are carried on otherwise than for profit and are solely or mainly directed to all or any of the following objects, namely:

" (a) the advancement or spreading of knowledge (whether generally or among persons belonging to the same or similar professions or occupying the same or similar positions);
(b) the maintenance or improvement of standards of conduct and competence among the members of any profession;
(c) the indemnification or protection of members of any profession against claims in respect of liabilities incurred by them in the exercise of their profession " (*r*).

If the activities satisfy the above conditions to a significant extent but not wholly, then approval may be given as regards a specified part only of subscriptions to such a body.

A fee, contribution or annual subscription must be of the nature specified above to be allowable deduction from the emoluments of an office or employment to be assessed to tax, and *also* the fee,

(*p*) *Ibid.*, s. 16 (1) (a) and Sixth Schedule.
(*q*) *Ibid.*, s. 16 (6).
(*r*) Finance Act, 1958, s. 16 (2).

contribution or subscription must be defrayed out of those emoluments. Further, if it is a fee which is to be deducted, such must be payable in respect of a registration or retention of a name in a roll or record or a certificate, which certificate must be a condition or one of the alternative conditions of the performance of the duties of the office or employment. If a contribution, it must be payable on the issue of such a certificate. If a subscription, then to qualify it must not only be paid to a body the activities of which are of the nature set out above, but such must be the relevant society to the office or employment. The performance of the duties of the office or employment must be directly affected by the knowledge concerned or involve the exercise of the profession concerned (*s*).

In common parlance, an annual subscription, to be deductible must be paid to the relevant non-profit-making, non-local society protecting or advancing the profession. The society must be approved and this is up to the society itself, not the individual.

Settlements on children generally

Section 20 makes various amendments to Chapter II of Part XVIII Income Tax Act, 1952, which chapter restricts the efficacy for tax purposes of various types of settlements on children of the settlor. The effect of that chapter, comprising sections 397 to 403, inclusive of Income Tax Act, 1952, is to cause all income paid by virtue or in consequence of a settlement to or for the benefit of a child of a settlor to be treated as income of the settlor for tax purposes if the child has a certain status. That status is defined in section 397 as being that " at the commencement of that year [*i.e.*, the year of assessment in which the payment was made] the child was an infant and unmarried." For the purpose of this legislation settlor and settlement are defined in wide terms (*t*) to cover almost any scheme whereby a person makes income available to his own child and in particular catches the normal settlement on children, absolute gifts to children, and covenants for their benefit. The object which the legislature set out to attain was that a parent might be prevented from making income in excess of £5 (*u*) available for educating and maintaining his own children (and thus benefiting himself) taxable only at the rate applicable to the children as taxpayers, whilst those children were under 21. An odd result, however, followed, due to the wording defining the status of the child concerned quoted above.

(*s*) *Ibid.*, s. 16 (4) (b).
(*t*) Income Tax Act, 1952, s. 403.
(*u*) *Ibid.*, s. 397 (3).

Unless the child was born on a 6th day of April the child is not during the first months of its life preceding the 5th day of April next following its birth a child who, at the commencement of the year of assessment, was an infant and unmarried. At the commencement of such year he was not even a child. It followed that payments made to or for the benefit of a child of the settlor, by virtue or in consequence of a settlement, prior to April 5 next following the child's birth, were treated as the child's income and not his parents' and taxed accordingly. A practice had therefore grown up whereby a parent signed a "seven year covenant" in favour of his child at the birth of such child, and the first year's payment (if not sufficiently large to cause the parent to lose his child allowance) gave rise to a repayment of the whole of the tax on such payment and no adverse tax result.

The anomaly above was liable to work to the detriment of the taxpayer when the child attained his majority or married. Where income is accumulated for the benefit of a child of a settlor under an "irrevocable" settlement not consisting of covenanted payments, the income is not deemed that of the parent (*a*). However, by virtue of Trustee Act, 1925, s. 31, accumulation normally ceases when the child is 21 and the income of the settlement must then be paid to him. Income paid to a child between his 21st birthday or marriage and the following April 5 would be paid to him during a year of assessment at the commencement of which the child was an infant and unmarried and, hence, would be deemed that of the settlor for tax purposes. Although further accumulation can be directed, such is normally bound to come to an end on the death of the settlor (*b*), which cesser could prove disastrous for estate duty purposes.

These two odd results of the wording of section 397 are put to rights by the relevant date for ascertaining whether the recipient is an infant and unmarried child of the settlor, being made "the time of the payment" and not the commencement of the year of assessment in which the payment was made (*c*). This will apply to all payments made after April 6, 1958, except payments in the year 1958–59 to a child born in that year, under a settlement made before July 9, 1958. Thus persons who sought to take advantage of the old rule by making a settlement for the benefit of a new-born child before the new section 20 first saw the light of day will gain the benefit thereof.

(*a*) Income Tax Act, 1952, s. 398 (2).
(*b*) Law of Property Act, 1925, s. 164 (1).
(*c*) Finance Act, 1958, s. 20 (1) and (2).

Further amendments on similar lines are made. As noted above, income accumulated under an "irrevocable" settlement for a settlor's infant children, not being covenanted payments from the settlor, is not deemed that of the settlor for tax purposes by reason of the infancy and unmarried status of the children. If, however, any distributions are made from the settlement to children of a settlor in a year of assessment at the commencement of which the children are infants and unmarried, such distributions are deemed income of the settlor in part, even though made out of capital. The part of the distribution taxed is so much thereof as corresponds with the income accumulated under the settlement for infant children of the settlor, account being taken of previous distributed sums. A major difficulty caused by this provision, namely that accumulated income passed to a child upon his attaining 21 years or marrying might thereby attract tax as income of the settlor, has for long been dealt with by the clumsy method of a published extra-statutory concession. An advancement of capital to a child between his 21st birthday or marriage and the following April 5 has never in terms been covered by the concession. This unhappy situation is now cleared up by the relevant time for ascertaining the infancy and unmarried status of the child being moved forward to the date of the payment rather than the commencement of the year of assessment in which the payment is made (*d*). Once again, this amendment will apply to sums paid after April 6, 1958, save a payment in 1958–59 to a child born in that year under a settlement made before July 9, 1958.

Finally, to complete this series of desirable amendments—long overdue—the definition of "irrevocable" settlement has been varied. A settlement, to be irrevocable, *inter alia*, must not be capable of being determined, subject to one exception, by the act or default of any person (*e*). The exception, which is the subject of the amendment, allowed there to be a provision for a determination if the only persons who could thereby benefit during the lifetime of a child of the settlor in any way interested under the settlement were the wife, husband or issue of the child. Hence, a straightforward settlement for infant children of the settlor under which income was to be accumulated could not, without the income being deemed that of the settlor, provide for the possibility of an appointment being made to, say, brothers or sisters of the settlor. This pointless restriction has now been altered, by putting in the more usual restriction that the settlor and his or her wife or

(*d*) Finance Act, 1958, s. 20 (1), (2) and (3).
(*e*) Income Tax Act, 1952, s. 398 (b).

husband may not benefit but anyone else can (*f*). In other words, subject to the exclusion of possible benefit to the settlor and his or her wife or husband, a settlement may be determinable without necessarily ceasing to be irrevocable. Settlements which previously had not been irrevocable but which, by virtue of this amendment, now are irrevocable, will be deemed to have become irrevocable on April 6, 1958.

Revocable and Determinable Settlements

Section 21 is what is left of the incredible Clause 18 of the original Bill (*g*). The following section is an additional section, added at a late stage in the passage of the Bill, bringing about a revolutionary change in the law not referred to in the Chancellor's budget statement. It was stated that section 21 was nececssary to nullify the effect of the decision in *I. R. C.* v. *Saunders* (*h*). That decision finally determined that a power to revoke or determine a settlement does not include a power merely to appoint part of the capital out of the settlement to a specified individual.

Section 404, Income Tax Act, 1952, briefly, provides for the case of a settlement in which any person has a power to revoke or determine the settlement, or any provision thereof, and the effect of the exercise of such power could benefit the settlor or his or her spouse by either reducing their liability to make annual payments by virtue of the settlement, or causing them to receive any of the capital or income of the settlement. If such a power is present (not being postponed in operation for six years from the original annual payment or settlement of capital), then whether or not it is exercised the annual payments will be treated as income of the settlor or the income arising under the settlement or a part thereof will be so treated, as the case may be. The device used to avoid the effect of section 404, proved efficacious by *Saunders'* case, was to provide for powers to appoint some but not all the capital in the settlement to the wife of the settlor, or to reduce the annual payments, but not to cause their complete cesser.

The new section reverses the *Saunders* decision, simply, by providing that power to revoke or otherwise determine a settlement includes, in section 404 (1), " power to diminish the amount of any annual payments which the settlor or the wife or husband of the settlor is or may be liable to make by virtue or in consequence of any provision of the settlement " (*i*), and in section 404 (2) " any

(*f*) Finance Act, 1958, s. 20 (5).
(*g*) See the somewhat restrained note, *ante*, Vol. 22, p. 221.
(*h*) [1957] 3 W.L.R. 574.
(*i*) Finance Act, 1958, s. 21 (2) (a).

power to diminish the property comprised in the settlement " (*k*). In the former case, ceasing to be liable to make an annual payment will also include " diminution of the amount of any such annual payments which the settlor or the wife or husband of the settlor is or may be liable to make " (*l*). Thus, the day of the settlement whereby the wife or husband of the settlor was included as an object of a power to appoint capital, but not the final £100 thereof, has gone.

Not content with reversing the decision in *Saunders'* case, but with the expressed intention of making Income Tax Act, 1952, s. 404 apply as was originally intended, both parts of that section are further amended by the new section 21, not now so prolix as in the original Bill, but still obscure of meaning. Section 21 (1) (a) provides that " references to a power to revoke or otherwise determine a settlement or any provision thereof shall be deemed to include references to any power to diminish the amount of any payments which are or may be payable under the settlement or any provision thereof," for the purposes of Income Tax Act, 1952, s. 404 (1). Further, for the purposes of section 404 (2), the new section 21 (2) (b) provides that a power to revoke or otherwise determine a settlement or any provision thereof should be deemed to include " any power to diminish the amount of any payments which are or may be payable under the settlement or any provision thereof to any person other than the settlor and the wife or husband of the settlor." These tortuously expanded definitions appear to be directed at a somewhat different type of settlement than any that could have been contemplated when the original section 404 was enacted. Prima facie these words cause a power to be one to revoke or determine a settlement if there is any power to vary the amount of any payment which may be made to any person under the settlement. It is questionable whether such words are apposite to catch discretionary settlements, where trustees have a power to apply the income amongst a class of beneficiaries so that such class must between them get the whole income, but the proportion is at the discretion of the trustees. The trustees can decide the amount of any payment to be made to a particular beneficiary, but such would not appear to be a diminution of any payment which the beneficiary might otherwise be entitled to. This view is supported by the provisions of the new section 22, which are deliberately applied to discretionary settlements.

The section is retrospective in that it applies to settlements whenever made; for income tax it applies to the year 1958–59 and

(*k*) Finance Act, 1958, s. 21 (1) (a).
(*l*) Finance Act, 1958, s. 21 (1) (b).

for surtax to total income for 1957–58. It should be noted, however, that it is still an overriding necessity for the settlor or his wife to benefit or be capable of benefiting from the power to revoke. If they cannot benefit, section 404 does not concern the settlor. Some chance to avoid the provisions of this section in the case of a settlement already in being is provided by subsection (4), a much amended and slightly improved version of the original sub-clause in the Bill.

There is no let-out for settlements made after April 16, 1958, although the section was not available until the end of that month. So far as a settlement made before April 16, 1958, is concerned, if such was not caught by the original section 404, but is caught by that section as amended by the new section 21, then if the power concerned has not been and is not exercised after April 15, 1958, *and* is removed before April 5, 1959, or such later date as the Commissioners of Inland Revenue in any particular case allow, section 21, subject to one condition, will not operate to cause income to be deemed that of the settlor. The condition is that in removing the power or in refraining from operating it between April 15, 1958, and April 5, 1959, no consideration or benefit is given to the settlor or his or her wife or husband. This new right to get out covers many of the criticisms directed at the original clause, but still suffers from serious defects. No solicitor could possibly check on all the settlements with which he has dealt to see what powers should not be exercised in view of the new amendment. Although the Commissioners of Inland Revenue have now discretion to allow time for the removal of an offending power should it not be apprehended for a while, no discretion is given if the power is in fact unwittingly exercised. In most cases, infringement of the new section will not be discovered until too late. Further, the section being in much wider terms than the budget statement, a payment made by the most conscientious trustees (having carefully followed the budget statement) between budget day and the publication of the Bill, may have swept away all chance of taking requisite action in time. Finally, how is the power to be removed? If such power is vested in trustees they probably have no power to release it (unless power to release has been expressly given). Can the wife assign some possible benefit to which she might become entitled in the future without taking consideration therefor? It is suggested that the safest course may well be an assignment of all benefit to the trustees by the wife or husband of the settlor upon further trusts. Such action must be effective, the trust fund being in the hands of the trustees when any appointment in favour of the wife or husband operates, and

no consideration to back the assignment would be necessary. Where an assignment could cause the determination of a life interest under a protective trust, more difficulties may arise. It is not possible to give any single answer to the question of what action will prove effective; no one precedent could possibly fit all cases.

One class of settlement is automatically exempted from the new rule. If an existing settlement entered into prior to April 16, 1958, was "entered into in connection with any judicial separation or any agreement between spouses to live separate and apart or with the dissolution or annulment of a marriage," the new section will not apply thereto (*m*).

Subsection 5 of section 21 clears up the doubt which previously existed as to the territorial limits of Income Tax Act, 1952, ss. 404 and 405. It is now declared that these sections apply and always have applied to any settlement wherever made.

Discretionary settlements

At the beginning of July what is now section 22 of the Finance Act, 1958, was introduced into the Bill, making a substantial change in the law more far-reaching than the anticipated tidying-up provisions contained in the two previous sections discussed above. Continuing the anachronistic process of unifying husband and wife for revenue purposes more completely than in any other sphere, this section prevents a man from making provision for his wife through the medium of a discretionary trust without the tax consequence that income so made available is taxed as if it were his own. Until this year there has been no absolute obstacle to a husband making a discretionary settlement under which the trustees were given a power to apply the income of the trust fund amongst all or any of a class of beneficiaries including the wife of the settlor. Indeed, it is difficult to see why there should be any objection. In so far as income is in fact paid to the wife of the settlor. it pays tax as his income (*n*); in so far as it is paid to others, why should it bear tax as income of the settlor, because it might have been paid to his wife?

Henceforth, if a discretionary power is contained in a settlement exercisable immediately or in the future, whereby any of the capital or income of the settlement may be paid or applied for the benefit of the settlor, his or her wife or husband, the whole or a requisite part of the income arising under the settlement will be treated as income of the settlor. Thus, whereas power to apply income in favour of the wife or husband of the settlor has had to be

(*m*) Finance Act, 1958, s. 21 (4), final paragraph.
(*n*) Income Tax Act, 1952, s. 354.

eschewed when income was accumulated under the settlement (*o*), such will now cause the income to be taxed as that of the settlor save in the specific cases exempted by section 22 whether or not the income is in fact distributed so as to be received by some other person. The section is deemed to be included in Chapter III of Part XVIII Income Tax Act, 1952, with the result that the definition section 411 and the provisions relating to recovery of the tax from the trustees and apportionment in the case of a multiplicity of settlors apply.

This new section, which overlaps to a large extent sections 404 and 405 Income Tax Act, 1952, provides for exemption of settlements in similar circumstances to both those original sections. Thus, if the power is postponed in operation for six years, from the time when the property or income concerned first becomes comprised in or arises under the settlement, the settlement will not disturb the taxation position so long as the power cannot be exercised. Further, if the terms of the settlement are such that the settlor would not be deemed to have an interest in the income or property arising under or comprised in the settlement for the purposes of Income Tax Act, 1952, s. 405, by reason of the proviso to subsection (2) of that section, the new section will likewise not operate in respect of that income or property. Section 405 it will be remembered allowed reverter to the settlor or his wife on the death of parties to a marriage or their children, bankruptcy or death under 25 of a person who would have been beneficially interested at that age. Further, there was the most useful exemption that the settlor his or her wife or husband had no deemed interest so long as a person was alive and under the age of 25 during whose life the income or property could not become payable to them save in the bankruptcy of that person or his assigning his interest. The new section 22 is thus unlikely to affect the form of most settlements which provide for the accumulation of income, whether or not containing discretionary powers and, as with the preceding section, affects no settlements where the wife or husband of the settlor has been rigorously excluded in addition to the settlor.

The provision for dealing with existing settlements, this section also being retrospective in applying to settlements already made, is similar to that discussed in relation to section 21 above. A get-out is provided in this case by reference to matters occurring before or after July 8, 1958, the date when this section burst upon the unfortunate taxpayer, permitting the rectification of existing settlements to prevent the rules operating for 1958–59 income tax

(*o*) Income Tax Act, 1952, s. 405.

and total income for surtax purposes for 1957–58. If the offending power which now, but not previously, causes the income to be treated as that of the settlor, has not been and is not exercised after 8th July, 1958, the settlement having been made before July 9, 1958, no adverse tax consequences will arise if the power is also rendered inoperable prior to April 5, 1959, or such later date as the Commissioners of Inland Revenue may in any particular case allow (*p*). The same difficulties arise as discussed above in the case of section 21, possibly in a rather more acute form. The power must be rendered inoperable but no consideration must flow to the husband or the wife. No payment must have been made to the settlor or his or her wife or husband since July 8, 1958. Where a settlement has been set up with the object of making income available in the future to the settlor's wife, she must be cut out, thus destroying the probably laudable purpose of the settlor, although he is given no right to put the clock back and reclaim his capital. This method of softening the blow adopted by the legislature emphasises once again the necessity of drafting all family settlements in such form that powers can be released and appointments made upon new and different trusts should future legislation render that course desirable. Also, the importance of having professional trustees, namely solicitors or accountants, even in the most innocent family settlement, cannot be over-emphasised: the burden placed on such trustees by this complicated and, it is submitted, illogical legislation is tremendous, but at least there is some hope that the trustees will have knowledge of important but little-publicised changes in the law which a family trustee cannot.

Profits Tax

Part IV of the Finance Act, 1958, contains a fundamental change in the system of profits tax. The two-rate profits tax introduced in 1947 whereby distributed profits were charged at a higher rate than undistributed profits is finally to be abolished. By section 25, as from April 1, 1958, profits tax will be charged on the profits arising in any chargeable accounting period at the uniform rate of ten per cent. on the amount of those profits, subject to the abatement provisions in section 33, Finance Act, 1947. There will be no allowance for non-distribution, nor will there be any distribution charge for any accounting period ending after the beginning of April, 1958. The change-over from the old system to the new system naturally necessitates some transitional provisions which are contained in the Seventh Schedule to the Act.

(*p*) Finance Act, 1958, s. 22 (5).

The main object of the transitional provisions is to ensure that companies do not take advantage of the new provisions to artificially reduce their profits tax liability. In consequence, for periods falling prior to April 1, 1958, where the profits tax payable for such period could still be influenced by dividends declared after knowledge of what is in the new Finance Act, regulations are made to ensure that dividends are not artificially decreased so as to avoid a distribution charge in such periods with the intention of increasing the distributions at a time when no distribution charge will be payable. The system used is to choose as a standard period the last period of account which could not be affected by any declaration of dividends made after April 15, 1958, Budget Day. This must be a period ending not later than October 14, 1957. The rate of dividend for that standard period must then be maintained in respect of other periods falling between the end of the standard period and the beginning of April, 1958. If the rate is not maintained, then a notional dividend will be deemed to have been paid for the purpose of the profits tax (*q*). Various safeguards are put in to ensure that such notional dividend is not unfair to the company. The amount to be added by virtue of the notional dividend to the gross relevant distributions for any chargeable accounting period is not to be greater, together with any dividends included in those distributions, than three-fifths of the profits for that period (*r*). Secondly, where such a notional dividend has been deemed to have been declared, and for the period between the end of the standard period and April 1, 1960 (or the cesser of the trade if earlier) both the rate of dividend and the rate of earnings are less than for the standard period, the notional dividend will be reduced proportionately taking account of the reduction in the rate of earnings (*s*). Finally, if the dividends included in the gross relevant distributions to proprietors for the standard period were exceptional, so that to continue the rate of dividend in that period would be inequitable, the Commissioners may direct that the rate of dividend for the standard period should be reduced as appears to be just (*t*). Paragraph 2 of the Seventh Schedule makes provision for the revocation of grouping notices given under section 22 of Finance Act, 1937, in consequence of the change in the nature of the tax, as was done when the differentiated rate between distributed and non-distributed profits was introduced.

Section 26 of the Act brings about certain amendments to the treatment of nationalised industries, co-operative societies and

(*q*) Finance Act, 1958, Seventh Sched., para. 1 (1) and (8).
(*r*) *Ibid.*, para. 1 (3).
(*s*) *Ibid.*, para. 1 (4).
(*t*) *Ibid.*, para. 1 (5).

building societies for the purposes of profits tax, following the recommendations of the Royal Commission. Section 27 sets time limits for assessments and claims for relief in connection with profits tax. No assessment to profits tax is to be made more than six years after the end of the chargeable accounting period in respect of which it is made (*u*). No limit is, however, set where any form of fraud or wilful default has been committed in connection with or in relation to profits tax and the assessment is made for the purpose of making good the loss of tax thus caused. A six-year period is also specified in the case of applications for relief in respect of errors or mistakes in a return or statement for the purpose of an assessment to profits tax (*v*).

Estate Duty

The case of *Re Hodge* (*w*) disclosed that the gift of a policy of assurance, unlike other gifts, could leave the donated property liable to duty on the death of the donor even where the donor survives the gift by more than five years. This anomaly has proved too complicated to put to rights by statute and so an extra-statutory concession, set out below, has been made. Section 28, a most complex section discussed further hereafter, is designed to extend the work of Finance Act, 1940, s. 43, preventing settlements being varied so as to reduce the potential estate duty liability save where such action takes place more than five years before the relevant death. The principal practice which the section hits at is the purchase of a reversionary interest under a settlement by a life tenant which transaction hitherto caused the purchase price to pass out of charge to estate duty immediately upon the purchase being made. This reduced the life tenant's estate whilst no extra duty flowed to the Revenue consequent upon the acquisition of the reversionary interest, for the whole settled fund was in any case subject to duty on such life tenant's death.

The hardship caused by the double levy of estate duty on one lot of property when two persons (usually husband and wife) die in a common calamity and the property would have been deemed to pass on both deaths, has been mitigated in two ways (*a*). First, by section 29 the artificial presumption laid down in Law of Property Act, 1925, s. 184, whereby the younger is deemed to have survived the elder if it is uncertain which of them died first, will no longer affect the estate duty position. The property chargeable

(*u*) *Ibid.*, s. 27 (1).
(*v*) *Ibid.*, s. 27 (2).
(*w*) [1957] 3 W.L.R. 958.
(*a*) *Cf. Re Beare* [1958] T.R. 181.

with estate duty in respect of each death (if they occurred after April 15, 1958) will be ascertained as if the persons had died simultaneously and all property had devolved accordingly. Secondly, if but a short time occurs between the deaths, then the rules relating to quick succession, which have been widened further as explained below, will give relief. Further, the additional estate duty payable when an accretion to an estate occurs by virtue of Wills Act, 1837, s. 33 will no longer be levied, the property no longer being deemed to pass (*b*). By that section, certain testamentary dispositions are saved (which would otherwise fail due to the beneficiary predeceasing the testator) by the beneficiary being deemed to survive the testator. The devolution of property laid down by that section is not altered, merely the duty payable cancelled. The relief applies if the later death occurs after April 15, 1958. Quick succession relief is extended to all property by section 30, subject to the rules laid down in the 8th Schedule. These provisions are summarised below.

Section 31 corrects a minor anomaly concerning objects of national, scientific, or historic interest. Such objects are exempt from duty on a death by virtue of Finance Act, 1930, s. 40, unless they are subsequently sold. Even on a sale, however, duty does not become payable if the sale is to the National Gallery, British Museum or certain other institutions. The exemption applied whether the sale was deliberate or by chance, in that such an institution became the purchaser at an auction. A restriction is now placed to ensure that the sale to the institution was intentional, by the exemption only operating when a sale to such institution is by private treaty. The following section clarifies the title of the recipient of property where such is transferred *in specie* to satisfy death duties. Various types of property can now be handed over in payment of duty. Such properties have gone to bodies of the nature of the National Trust or the Youth Hostels Association. Doubts arose in cases where the deceased had not been the absolute owner of the property as to whether the persons with power to sell property in order to pay the duty had power to transfer the same in settlement of the liability. Section 32, acting fully retrospectively, enables any person with power to sell any property in order to raise money for the payment of any estate duty to agree with the Commissioners for the property to be accepted in satisfaction of that duty in pursuance of any enactment authorising its acceptance by the Commissioners. In other words, if the Commissioners are empowered under any enactment to accept the property, then the person accountable may transfer it; the section does not widen

(*b*) *Cf. Re Scott* [1901] 1 K.B. 228.

the scope of the enactments enabling property to be handed over *in specie*.

Finally, in the estate duty part of the Act, section 33 extends Finance Act, 1956, s. 33, to the case of an interest in a house valued for estate duty purposes and then, within five years of death, demolished in pursuance of a demolition order under Part II of the Housing Act, 1957, or a clearance order under Part III of that Act. The 1956 Act gave relief where an interest in land was valued for estate duty and then compulsorily purchased within five years. In the case of a demolition or clearance order, the 1956 Act is to operate as if a compulsory purchase at site value had been made, the notice to treat having been given when the demolition or clearance order was made. If a demolition order is avoided by an undertaking being given pursuant to which demolition takes place, the same result is achieved by the notice to treat being deemed to have been given on the date of the undertaking (*c*).

Duty on policies

The Financial Secretary to the Treasury on the Second Reading referred to the case of *Re Hodge* (*d*) and to the indication, that had been given when that case was decided at first instance, that a strong case for amending the law had been shown. That a gift should cling to the donor for estate duty purposes *ad infinitum* merely because of the particular nature of the property is clearly inequitable. However, he indicated that the whole question of the treatment of life assurance policies under the estate duty law was subject to a review, but had so far baffled the planners. The problem of *Re Hodge* was therefore to be dealt with on a temporary basis (which it is hoped will turn out to be only temporary), by way of concession. Such concession is stated in the following form (*e*):

> " Where a beneficiary is absolutely and indefeasibly entitled to a policy of assurance for a sum of money payable on the death of another person, no duty will be charged thereon on the death of that person, provided that the beneficiary became so entitled more than five years before the death and the life assured neither retained any benefit for himself nor paid any premiums within the five years. Where the other conditions are satisfied, but the life assured paid some premiums in the five years before his death, the claim to duty will be limited to the proportion of the policy moneys corresponding to the ratio

(*c*) Finance Act, 1958, s. 33 (2).
(*d*) [1957] 3 W.L.R. 958.
(*e*) *H. of C. Official Report*, Vol. 588, No. 107, May 12, 1958, cols. 49–50.

between the premiums paid by the life assured during the five-year period and the total premiums."

This concession will apply to all deaths after April 15, 1958, irrespective of the date when the gift was made.

Purchase of interests in expectancy

Section 28 is a further step to prevent any person reorganising his interests in settled property to reduce the amount of property dutiable on his death during the last five years of his life, although, as usual, there is no correlative provision exempting additional property acquired during that period. Finance Act, 1940, s. 43, prevented settlements being broken in most ways that would have avoided a charge on the death of the owner of a limited interest, unless such breach took place five years prior to the death. Various methods which had the effect of escaping section 43 are now rendered unavailable for the purpose of mitigating duty.

Finance Act, 1958, s. 28, applies where within five years before a death (one year in the case of purchase from a charity (*f*)) there has been an interest in any settled property limited to cease on death and a purchase of another interest in that property expectant on or subject to the interest so limited. If such purchase was made either by the deceased or out of or by means of property which would have passed for the purposes of estate duty on his death if he had died immediately before the purchase, an additional charge to duty may be raised. That charge would be raised by there being deemed to be included in the property passing on the death "a sum of money equal to the amount or value of the consideration given for the purchase of that other interest." Thus, in the simple case where property is settled on A for life and then to B, and A purchases B's remainder within five years of A's death, there will now be dutiable on A's death not only such of the settled property as remains part of his free estate, but also a sum equal to the purchase price paid to B.

The consideration where the purchase is not for cash will be valued at the date of purchase, any acquisition or extinction of an interest for money or money's worth will be treated as a purchase, and provision is made for apportioning purchase prices given for more than one interest or property (*g*). The dutiable sum, if the purchase was made by the deceased, will be treated as property to which he was absolutely entitled at his death, and hence the duty will be payable by his estate and accountable for by his personal representatives (*h*). No liability falls on the recipient

(*f*) Finance Act, 1958, s. 28 (10).
(*g*) *Ibid.*, s. 28 (11) (a) (b) and (c).
(*h*) *Ibid.*, s. 28 (7).

of the purchase price and hence the purchase of the reversion by the life-tenant of a large settled fund with small free estate may still be efficacious for duty purposes. If the purchase was made otherwise than by the deceased, the dutiable sum will be treated as forming part of the property out of or by means of which the purchase was made. Trustees who may thereby become accountable for the duty can apply for a certificate under section 44 of Finance Act, 1950, as to the prospective duty should they be called upon to part with the settled fund (*h*).

The section applies to all purchases made after April 15, 1958, but will not affect any case where no duty is chargeable on the settled property by reason of the coming to an end of the limited interest, nor would have been if that interest had continued to subsist (*i*). Such a case would occur where the life-tenant is the surviving spouse purchasing the remainder interest. Similarly, where the settled property is of too small a principal value for duty to have been payable had the limited interest continued until normal cesser, no charge is now raised. Subsection (4) ensures that where an actuarial division of settled property takes place by an exchange of partial interests (a transaction which already attracts duty on the death of the life-tenant on the part taken by the remaindermen should such death occur within five years of the transaction), that transaction does not give rise to further duty under the new section and cause a double charge.

Where the purchase does not cause a settlement to come to an end, so that the settlement still subsists at the death, the section will not apply unless the interest purchased passes for the purposes of estate duty on the death (*k*). For this purpose (i) if the settlement comes to an end as regards part only of the settled property, it will be treated as a separate settlement of that part; (ii) if the interest purchased has been divided before the death, then the purchase will be treated as a separate purchase of each of the divided interests (*l*); and (iii) an interest into which the purchased interest has been absorbed or enlarged will be treated as if it was the subject-matter of the purchase (*m*). In such case, the persons accountable for duty in respect of the purchased interest may elect within twelve months of the death, or such longer period as the Commissioners of Inland Revenue may allow, that the new section shall not apply. In doing so, however, they must also elect that section 7 (10) of the Finance Act, 1894, which prevents property being dutiable twice on the same death, shall also not apply. The

(*i*) *Ibid.*, s. 28 (12).
(*k*) *Ibid.*, s. 28 (1), proviso.
(*l*) *Ibid.*, s. 28 (2).
(*m*) *Ibid.*, s. 28 (3).

alternative to an additional charge by reference to the purchase price is thus an additional charge by reference to the value of the purchased interest at death.

If the interest limited to cease on death is such that on cesser of that interest the settled property is to be treated as passing to a limited extent only, then the consideration for the purchase will be reduced correspondingly for the purposes of the charge to duty. A double charge is prevented when a debt has been incurred or an incumbrance created for the purpose of the purchase of the interest in expectancy. Such debt or incumbrance would normally be disallowed for duty purposes (*n*), but where duty is charged under the new section 28, such debts and incumbrances will be deductible (*o*). In the case where the new charge is by election placed on the value of the interest at death and not on a sum equal to the consideration given in purchasing that interest, the deduction is only to be made from that value and not otherwise (*p*).

Quick succession relief

Under Finance Act, 1914, s. 15, relief was given by way of a percentage reduction of the estate duty payable on the second death when estate duty becomes payable on the same property on two successive deaths occurring within five years of each other. This provision was, however, restricted to property consisting of land or a business not being a business carried on by a company. The relief was extended slightly by Finance Act, 1954, s. 30 (4), to the case where the property was shares and debentures in a controlled company which fell to be valued on the assets basis, to the extent that the value of land or a business was reflected in the shares. These two sections are now repealed and a general quick succession relief introduced.

Under Finance Act, 1958, s. 30, where estate duty becomes payable on a death and the Commissioners of Inland Revenue are satisfied that estate duty has been payable on the same property on an earlier death occurring within five years before the later death, then, subject to certain restrictions, the duty payable on the property on the latter death will be reduced, if the gap between the deaths was less than three months, by seventy-five per cent., less than one year by fifty per cent., less than two years by forty per cent., less than three years by thirty per cent., less than four years by twenty per cent., or less than five years by ten per cent. This provision is applicable when the later death occurred after

(*n*) Finance (1909–10) Act, 1910, s. 57; Finance Act, 1939, s. 31.
(*o*) Finance Act, 1958, s. 28 (8).
(*p*) *Ibid.*, s. 29 (9).

April 15, 1958. The person entitled to the property immediately before the later death must not have acquired his title by purchase for money or money's worth, whether by himself or another, since the earlier death (*q*). Further, the relief will be calculated on the lower of the value of the property at the second death and *the net value of the property after the earlier death* (*r*). The net value after the earlier death is defined in paragraph 1 of the Eighth Schedule. It is normally the value on which estate duty was paid at that death, less the duty paid out of the property. When property is transferred to a person specifically entitled thereto on the earlier death, to find the net value there must also be deducted liabilities paid thereout which were not allowed as deductions for duty purposes. Property satisfying bequests other than specific legacies on the earlier death will be valued at the time of payment or appropriation less any charges or incumbrances subject to which payment or appropriation is made.

The difficulty of identifying cash passing on the first death at the time of the second death is dealt with to the benefit of the taxpayer in paragraph 2 of the Eighth Schedule. Any property which the second deceased had at his death or at any time since the first death, not being property which would qualify for the relief, is to be regarded as representing the sum of money received on the earlier death, provided that it in fact could represent that sum. In other words, to the extent that the sum would still form part of the second deceased's estate if he had always used other property for the dispositions by him since the earlier death, it is considered to be represented by his assets at death. In so far as his assets at death are insufficient to cover that sum, the benefit of identity with property passing on the previous death will be given rateably to the gifts and settlements made by the second deceased, the property in which is taxable on his death. Further, if property received on the earlier death is disposed of for money or money's worth by the second deceased during his life, all relief will not be lost. In this case he will be treated as having received money on the first death to the net value of the property after that death, or the value received when he disposed of it, whichever is the less (*s*). Further, a receipt of property or a sum of money on the earlier death will include property or money received under a gift dutiable on the earlier death or on a distribution under a settlement of property in respect of which duty was charged on the first death (*t*).

Paragraph 3 of the Eighth Schedule deals with the case where the dutiable property on the second death is or has been settled.

(*q*) Finance Act, 1958, s. 30 (2).
(*r*) *Ibid.*, s. 30 (3).
(*s*) *Ibid.*, Eighth Sched., para. 2 (2).
(*t*) *Ibid.*, para. 2 (3).

The property comprised in the settlement is regarded as the same property on both deaths, notwithstanding substitutions. Neither the first nor the second deceased must have acquired his interest under the settlement by purchase unless both acquired under the same purchase. Relief is allowed where on the later death the settled property is dutiable under section 43 of Finance Act, 1940, although the settlement has come to an end. Relief is not in this case allowed where the first death occurred after the end of the settlement unless such death was that of the settlor or of a person who received part of the settled property otherwise than by purchase (*u*). If the first death occurred after the end of the settlement, then, on a section 43 claim being made on the second death, the amount of the settled property which is regarded as having borne duty on the first death is ascertained by finding the settled property which was distributed *in specie* and remained part of the first deceased's estate and also what part of the first deceased's estate represented any money distributed to him or property distributed *in specie* and later sold by him. This is done in similar fashion to that set out above for tracing money received on the first death absolutely into the estate of the second deceased (*a*).

Paragraph 4 of the Eighth Schedule deals with the case where the property is chargeable on the second death by reference to an *inter vivos* gift by the deceased. The donor must not have acquired his title by purchase. Save where the donee predeceases the donor, the property dutiable on the second death as property comprised in the gift is to be regarded as the same as the property originally comprised in the gift. If, however, the donee dies first, then, for the purpose of allowing relief on the donor's death by reference to duty paid on the donee's death, the property chargeable on the donor's death is to be regarded as the property which would have been chargeable if the donor had immediately predeceased the donee. If that property (not being settled property) includes a sum of money so that identity with the donee's estate would not be established, the property chargeable on the second death will be regarded as the same as any other property comprised in the donee's estate which could represent the property originally given, if the donee had always spent his other money (*b*).

When the donee predeceases the donor no relief will be allowed on the donor's death by reference to any death subsequent to that of the donee. A disposition for partial consideration may give rise to a charge to duty on the death of the disponor. In order to

(*u*) *Ibid.*, para. 3 (4).
(*a*) *Ibid.*, para. 3 (5).
(*b*) *Ibid.*, para. 4 (4) (a).

allow quick succession relief to be given in this case, such a disposition is regarded as the gift and not as a purchase in money or money's worth. Where, however, relief is then given in respect of property comprised in the gift, the net value after the earlier death of the relevant property (which restricts the amount of relief available) is to be abated in the same proportion as the estate duty payable on the later death is abated by reason of the consideration given (*c*).

Stamp Duty and Miscellaneous

Section 34 (clause 28 of the original Bill) brings about the reduction of *ad valorem* stamp duty on conveyances. This section, which is in its original form, was discussed in a note at page 218, *ante*, where a table of the new rates was also set out. The main change is to reduce the rates payable on conveyances of small properties and, in the case of property where the consideration is less than £3,500, stamp duty other than deed stamp will no longer be exigible. Section 35 contains a number of minor amendments to the stamp duty legislation, all of a relieving nature, concerned with advances made by local authorities and the transfer of water undertakings.

Part VII of the Act, headed "Miscellaneous," starts with section 36 extending the provisions for financing nationalised industries out of the Exchequer, increasing the limit of advances now made by the small matter of some £370,000,000! Section 37 deals with the treatment for tax and estate duty purposes of pensions payable under the Overseas Service Act, 1958. Such pensions, in so far as they relate to overseas service, will be treated as if the part referable to such service was paid by the overseas government direct to the non-resident pensioner. Section 38 makes certain amendments with regard to annuities payable under the Tithe Acts, 1936 and 1951. Compulsory redemption of small annuities has been taking place, but the limit has been £1. This limit is now raised to £3 (*d*). Further, there will now be annual instead of half-yearly collections of annuities, which will be payable in one yearly sum on October 1. Finally, section 39, which the Financial Secretary to the Treasury referred to as "the daintiest last that makes the end most sweet," provides for the winding up of the Treasury chest fund. The system of Treasury chests as a means of obtaining local currency for service pay and other service expenses is now obsolete. The balance will be transferred to the Exchequer.

(*c*) *Ibid.*, para. 5.
(*d*) Tithe Act, 1936, s. 11 (1) (a); Finance Act, 1958, s. 38 (5).

VARYING TRUSTS

Variation of Trusts Act, 1958

By W. J. Mowbray, *Barrister-at-Law*

It can seldom have happened that a practitioner at the Criminal Bar has gone out of his way to increase the jurisdiction of the Chancery Judges. That, however, is what Mr. Petre Crowder did when he introduced in the House of Commons his Private Member's Bill which has since become the Variation of Trusts Act, 1958. The new Act gives effect to the recommendations on this subject of the Law Reform Committee (*a*). It provides, broadly speaking, that the court can approve an arrangement varying the trusts of any property on behalf of anyone interested who is unable to approve the variation for himself. This is an important extension to the jurisdiction, which was made necessary by the decision of the House of Lords in *Chapman* v. *Chapman* (*b*) that the court could approve an agreement to vary trusts only in certain narrow classes of cases. The jurisdiction given by the new Act takes its place among other powers of the court to vary trusts. It differs from most of the other powers, however, in that it is a mere power to assent and (with few exceptions) no order made under the new Act can override the wishes of any beneficiary ascertained and capable of making up his own mind on the proposed variation.

What Arrangements the Court can Sanction

The court is given jurisdiction to sanction "any arrangement . . . varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts." It is thought that the reference to varying and revoking trusts applies only to beneficial trusts. It will be observed that beneficial trusts can be revoked *in toto* but powers of managing and administering can only be enlarged.

The jurisdiction to approve arrangements is not limited, except by the requirement that the arrangement must, with narrow exceptions, be for the benefit of those on whose behalf the court assents (*c*). In this it resembles the jurisdiction given by section 64

(*a*) 6th Report, 1957, Cmnd. 310.
(*b*) [1954] A.C. 429.
(*c*) See p. 375, *post*.

of the Settled Land Act, 1925, for the court to permit any "transaction affecting or concerning" settled land by the tenant for life where he has no power to effect the transaction, but an absolute owner would have such power and its exercise would be for the benefit of the land or of those interested in it. The section applies to land held upon trust for sale (*d*), where the trustees for sale take the place of the tenant for life. This, too, is a wide jurisdiction which has been generously exercised where the transaction proposed is for the benefit of those interested (*e*). But it applies only to settlements of land; it does not even apply to capital moneys under the Settled Land Act, 1925. The new Act applies to any settled property.

The jurisdiction given by the Variation of Trusts Act, 1958, to enlarge powers of management is similar to the jurisdiction given with regard to "any property vested in trustees" (*f*) by section 57 of the Trustee Act, 1925. By that section, where in the management or administration of any such property any disposition or any transaction is in the opinion of the court expedient but the trustees have no power to effect it, the court may confer on the trustees, either generally or in a particular instance, the necessary power for the purpose on such terms and conditions and with such ancillary directions as the court thinks fit. It will be seen that the jurisdiction under this section, like that under the new Act, is to enlarge powers, not to take them away. It applies to powers of management only (*g*).

Jurisdiction to Assent

The jurisdiction under the new Act closely resembles the court's inherent jurisdiction to approve compromises of genuine disputes over the destination of settled property. The court can under its inherent jurisdiction approve such a compromise on behalf of infants or unborn or unascertained persons (*h*). But there must be a real substantial question which the court would otherwise have to decide (*i*). It will not do to dress up an agreed variation of a trust

(*d*) Law of Property Act, 1925, s. 28 (1); *Re Simmons* [1956] Ch. 125.

(*e*) *e.g.*, in *Re Simmons* (*supra*).

(*f*) These words exclude land held in strict settlement which is vested in the tenant for life.

(*g*) *Re Downshire Settled Estates* [1953] Ch. 218, though a variation of administrative powers may indirectly have a similar effect to a variation of trusts: see *Re Cockerell's Settlement Trusts* [1956] Ch. 372. As to the meaning of administration see further *Re Forster's Settlement* [1954] 1 W.L.R. 1450, a rather special case.

(*h*) *Re Lord Hylton's Settlement* [1954] 1 W.L.R. 1055 (compromise of appeal sanctioned by C.A.).

(*i*) *Chapman* v. *Chapman* [1954] A.C. 429.

instrument as a compromise of a dispute (*k*). The new jurisdiction differs from the old inherent jurisdiction in that there is no need of a dispute; but it is like it in that it is a mere jurisdiction to assent to an agreement. In this it differs from the court's other statutory powers, which are powers, if necessary, to override the wishes of some of the beneficiaries. Thus where a tenant for life applies under section 64 of the Settled Land Act, 1925 (*l*), for the court's sanction of a transaction, if the court decides the transaction is for the benefit of the settled land it can permit the tenant for life to carry it out even though the remaindermen are of a different opinion. Likewise, where trustees apply to the court under section 57 of the Trustee Act, 1925 (*m*), for power, for instance, to buy a house for the beneficial occupation of their tenant for life (*n*) the court has jurisdiction to give such powers against the objections of the other beneficiaries.

On Whose Behalf the Court Can Assent

The new Act provides (*o*) that the court can assent to an arrangement on behalf of four different classes of persons:

(i) Any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting (*p*). The most usual "other incapacity" will presumably be unsoundness of mind. In such a case if a committee or receiver has been appointed the Master in Lunacy, not the court, decides whether the arrangement is for the benefit of the patient (*q*). There will come within this class, for instance, infants interested in a gift to such of them (mentioned by name) as attain the age of 21. They are contingently interested and incapable of assenting for themselves. Presumably the reference to indirect interests refers to cases where an interest under a trust is itself settled by a subsidiary settlement. In such cases the trustees of the subsidiary settlement have wide powers under section 15 of the Trustee Act, 1925, to compromise claims and accept composition for property claimed, but these powers are not always wide enough and trustees are not always prepared to exercise them without the sanction of the court. The present jurisdiction presumably allows the court to sanction an arrangement

(*k*) *Re Powell-Cotton's Resettlement* [1956] 1 W.L.R. 23.
(*l*) Discussed, *ante*, pp. 373–374.
(*m*) Discussed, *ante*, p. 374.
(*n*) Trustees cannot do so without the authority of an express power or of the court if it would involve paying extra for vacant possession, etc.: *Re Power* [1947] Ch. 572.
(*o*) s. 1 (1).
(*p*) s. 1 (1) (a).
(*q*) s. 1 (3).

between two sets of trustees on behalf of infants interested under the subsidiary settlement.

(ii) Any person unborn (*r*). The usual case in which this jurisdiction will be invoked is where property is held upon trust for all the children of a person who is still alive and capable of having children or more children. Take the example (*s*) of a settlement on trust for A for life with remainder to his widow for life with remainder to his children, and on failure of such earlier trusts with an ultimate remainder to the persons who would be the settlor's next-of-kin if he were to die on such failure. If at the date of the application to the court A is a bachelor the court can, under this power, assent on behalf of any children he may have. For it is certain (*t*) that they are unborn. The court cannot, however, assent under this power on behalf of A's widow or the class of the settlor's next-of-kin. They may all be unborn at the date of the application, but it cannot be said for certain that they are. They certainly fall, though, within the next class.

(iii) Any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons (*u*). The words in brackets make it plain that A's widow and the settlor's next-of-kin in the example given above are included. The reference to events makes it plain that the determining event may be, for instance, the failure of earlier trusts.

(iv) Any person in respect of any discretionary interest of his under the statutory or similar (*v*) protective trusts where the interest of the principal beneficiary has not failed or determined (*a*). The existence of a protected life interest has often been the rock on which a consensual variation of trusts has split in the past. For if the ordinary statutory form is employed, any dealing with his life interest between the life tenant and the remaindermen will bring the life interest to an end and put into operation the discretionary trusts. In well-drawn settlements it has become the custom to permit the protected life tenant with the consent of the trustees to release his life interest in favour of those next entitled—an action which, if taken more than five years before he dies, has obvious estate duty advantages (*b*)—but not every settlement contains such

(*r*) s. 1 (1) (c).
(*s*) Given by Lord Cohen in the debate on the Bill in the House of Lords, *Hansard*, Vol. 210, No. 84, June 30, 1958, col. 373.
(*t*) Taking " children " in its usual legal meaning of legitimate children.
(*u*) s. 1 (1) (b).
(*v*) s. 1 (2).
(*a*) s. 1 (1) (d).
(*b*) See Finance Act, 1940, s. 43 (2), as amended.

a provision. Under the present provision the court could assent to such a release on behalf of the class to which payments could be made under the discretionary trust, so long as the life interest had not already been forfeited.

The Court Cannot Assent for a Beneficiary Capable of Assenting

It is a principle of the Act that the court shall not assent on behalf of anyone capable of assenting for himself. Thus it is expressly provided (*c*) that the court shall not assent under (iii) above on behalf of anyone who, if the determining event had happened at the date of the application to the court, would have been within the specified class or would have answered the specified description. For instance if property is held upon trust for A (who is still alive) for life with remainder to such of them X, Y and Z (named persons) as are living at his death, the court cannot assent to a variation on behalf of X if he is *sui juris*. X is able and entitled to make up his own mind whether the arrangement shall go through. Class (iv) above provides an exception to the rule that the court cannot assent on behalf of persons who could assent for themselves. If the protected life interest has not been determined the court can sanction a variation of the trusts against the wishes of the class of persons in whose favour income would be applicable on the forfeiture of the life interest. As the shadowy (*d*) interests of this class are in most cases really inserted *in terrorem* so as to dissuade the life tenant from forfeiting his interest the exception seems a not unreasonable one.

Benefit of Beneficiary

With one exception the court can approve on behalf of a person only an arrangement which is for the benefit of that person (*e*). Thus either the beneficiaries who are ascertained and *sui juris* must make it worth the while of the others to enter into the arrangement or the arrangement must itself result in a similar benefit to those others (*f*). The class at (iv) above provides the exception to this rule also. The court can sanction an arrangement which is not for the benefit of those to whom income could be paid if a protected life interest which has not been forfeited were forfeited (*g*). If the

(*c*) s. 1 (1) (b) proviso.

(*d*) So described by the Law Reform Committee, 6th Report, 1957, Cmnd. 310 at p. 8.

(*e*) s. 1 (1) proviso.

(*f*) Perhaps by reducing the incidence of tax or duty.

(*g*) s. 1 (1) proviso.

interest has been forfeited the court will probably be able to assent under (i), (ii) or (iii) above, but in that case the discretionary class will have to be " bought out."

Who Can and Who Should Apply

The Act gives jurisdiction to sanction an arrangement " by whomsoever proposed " (*h*). There is therefore apparently no limit on who may apply for the court's assent to a variation. The case will sometimes arise in which no ascertained person is both beneficially interested in the trust property and *sui juris*. For instance in *Chapman* v. *Chapman* (*i*) itself the trust property was held upon trust for such of the children of X (all infants) as should attain the age of 21 and until the youngest attained 25 or until the end of a perpetuity period upon trust to apply so much of the income as the trustees thought fit for the benefit of X's children. In such a settlement while all the children are infants no one both has an interest in the trust property and is *sui juris*. It is thought that in such circumstances either the trustees of the settlement or the next friend of an infant contingently entitled could and should make the application. It is to be observed that the Act does not require the proposer of an arrangement to have a beneficial, or even a bare legal, interest in the settled property. In the ordinary case where there are ascertained persons interested who are *sui juris* it would probably be best for all of them to be joined as applicants, that is, as positively propounding the arrangement. In such a case the trustees can be of more assistance to the court if joined in the more neutral capacity of respondents.

The Court's Discretion

The court's discretion whether it thinks fit to assent to an arrangement is absolute. The Court of Appeal is reluctant to interfere with the similar discretion under the inherent jurisdiction to sanction compromises (*k*) and there is no reason to suppose that it will take a different attitude over the exercise of the discretion under the new Act. It is also for the court to decide whether an arrangement is for the benefit of any person on whose behalf it is assenting unless that person is within class (i) above and a committee of his estate or receiver of his income has been appointed, when the decision on this point rests with the judge or Master in Lunacy. Even in such cases it appears still to be a question for the court whether it thinks fit to approve the arrangement.

(*h*) s. 1 (1).
(*i*) [1954] A.C. 429.
(*k*) *Re Powell-Cotton's Resettlement* [1956] 1 W.L.R. 23.

Choice of Court and Form of Proceedings

The county court has jurisdiction to approve an agreement under the new Act where the trust property does not exceed £500 in value (*l*). The parallel jurisdiction under section 64 of the Settled Land Act, 1925, and section 57 of the Trustee Act, 1925, has hardly been used and it seems unlikely that many applications will be made under the new Act in the county court. The main jurisdiction lies with the Chancery Division of the High Court.

By an amendment (*m*) to Order LV, Rule 14A, of the Rules of the Supreme Court, applications under the new Act may be made by summons in the Chancery Division. The summons will therefore be a not *inter partes* summons in a form similar to that generally employed in proceedings under Rule 14A. It should be intituled in the matter of the will, settlement, trust or property as the case may be and in the matter of the Variation of Trusts Act, 1958. It is thought that the body of the summons should simply contain an application that the court may approve on behalf of the necessary beneficiaries a deed of family arrangement or some similar document which is either in draft or already executed by the other beneficiaries subject to the approval of the court. It may be as well to add words allowing the arrangement to be varied at the hearing with the consent of all parties and the court and to ask for an order formally directing that the arrangement shall be binding on everyone interested in the trust property.

By paragraph (3A) which has been added to Rule 14A, in an application under the new Act the settlor and any other person who provided property for the purposes of the trusts in question must if still alive and not an applicant, and unless the Judge or the Master for special reason otherwise directs, be made a respondent to the summons. It is thought that in addition to the settlor, if alive, everyone interested in the trust property should if possible be joined either as applicant or as respondent. Where there are beneficiaries who cannot be joined, for instance unborn persons, it will often be possible to obtain an order under Order XVI, Rule 32(b) that someone (if possible a living person with the same interest) shall represent them. If this is not possible it will presumably be the duty of counsel for the trustees (if they are not applicants) to argue for the unjoinable beneficiaries.

(*l*) s. 1 (4) of the new Act amending s. 52 of the County Courts Act, 1934, and providing that the parties cannot confer any larger jurisdiction by consent under s. 53 of the latter Act.

(*m*) Rules of the Supreme Court (No. 2) Order, S.I. 1246 of 1958, Art. 9.

What Arrangements Will The Court Sanction?

The arrangements which are proposed for the court's approval will no doubt be many and very various. It is not, therefore, possible to deal with them in detail, but it is proposed first to deal with the vexed general question whether the new jurisdiction will be used to permit arrangements whose purpose is the avoidance of tax or duty and then to mention two possible particular kinds of arrangements which, it is thought, may soon be proposed.

It seems that the fact that the object of a proposed arrangement is to save tax or duty will not of itself dissuade the court from approving it under the new Act. It is true that in *Chapman* v. *Chapman* (*n*) Lord Morton deprecated the embarkation by the court on an " undignified game of chess " with the legislature in exercising its inherent jurisdiction for the avoidance of fiscal burdens. However, where the courts have been asked to exercise a statutory jurisdiction to vary trusts they have not refused to do so merely because it would result in a saving of tax or duty. The courts have purposely acted with the object of avoiding fiscal burdens in exercising their jurisdiction under the Matrimonial Causes Act, 1950 (*o*), section 171 of the Law of Property Act, 1925 (*p*), and section 64 of the Settled Land Act, 1925 (*q*). The Court of Appeal has also sanctioned under the inherent jurisdiction a compromise which had a similar effect (*r*). It seems, therefore, that the fact that an arrangement is intended to save tax or duty will not of itself be a bar to approval by the court. But of course the court will not approve an arrangement so close to the border between tax avoidance and tax evasion that an upright citizen would be chary of entering into it.

It remains to be seen whether the courts will approve under the new Act an extension of the investment clause of a will or settlement so as to allow investment in ordinary shares. The investment clauses of charitable trusts have been extended by way of scheme to allow a proportion of their funds to be invested in " equities " (*s*), but it has been most unusual (*t*) for the courts to permit investment in a new class of securities generally, even though there is jurisdiction to do so under section 57 of the Trustee Act, 1925. There does not appear to be anything in the new Act to

(*n*) [1954] A.C. 429, at p. 468.
(*o*) *Thomson* v. *Thomson* [1954] P. 384.
(*p*) *Re C.W.M., 1941, No. 2396* [1951] 2 K.B. 714 (C.A. sitting as Judges in Lunacy).
(*q*) *Re Simmons* [1956] Ch. 125.
(*r*) *Re Lord Hylton's Settlement* [1954] 1 W.L.R. 1055.
(*s*) *e.g.*, in *Re Royal Society's Charitable Trusts* [1956] Ch. 87.
(*t*) For an example see *Re Brassey's Settlement* [1955] 1 W.L.R. 192.

change the view of the courts (*u*) that it is undesirable to allow investment in equities in private trusts.

It may well turn out that during the next few months the most important use of the new jurisdiction will be to secure the benefit of section 21 (4) of the Finance Act, 1958. By section 404 (2) of the Income Tax Act, 1952, income arising under a settlement is accounted the settlor's income for tax purposes if anyone can revoke the settlement or any provision thereof so as to benefit the settlor or his or her wife or husband. The House of Lords has lately held (*a*) that a settlement does not fall within this subsection even though the trustees can transfer all but a tiny proportion of the settled capital to the wife of the settlor absolutely. This decision has been reversed by section 21 of the Finance Act, 1958, for income tax for 1958–59 and later years and also for estimating total income for surtax for 1957–58 and later years. In future if the trustees can raise and pay part of the capital to the settlor or the settlor's husband or wife the income of that part will be accounted the settlor's for tax purposes. But section 21 (4) gives a *locus poenitentiae* for settlements made before April 16, 1958. If the power to raise and pay capital to the settlor or the settlor's husband or wife is not exercised after April 15, 1958, and is released or otherwise abrogated before April 5, 1959 (or such later date as the Commissioners allow in a particular case), the existence of the power will not make income arising in the intervening period the settlor's for tax purposes.

If the power which must be got rid of to secure the benefit of section 21 (4) of the Finance Act, 1958, is simply a power for the trustee of the settlement to raise and pay capital to the settlor and his present wife the trustees can, with their consent, simply release the power. But if the power is for the benefit of any wife, present or future, of the settlor his present wife will not be able to authorise the trustees to release it and, of course, they will not be able to release it without authority. It has been suggested that in these circumstances the court would approve on behalf of all possible future wives of the settlor an arrangement releasing the power. As Parliament plainly contemplates that positive tax-avoiding action will be taken to secure the benefit of section 21 (4) it is thought that the court would be inclined to approve such an arrangement provided that such other provision was made for the future wives as to make the arrangement

(*u*) Exemplified in *Re Powell-Cotton's Resettlement* [1956] 1 W.L.R. 23.
(*a*) *I. R. C.* v. *Saunders* [1958] A.C. 285; *cf. Countess of Kenmare* v. *I. R. C.* [1958] A.C. 267, where the power extended to the whole of the settled funds.

as a whole beneficial for them. But would such an arrangement secure the exemption of section 21 (4)? By section 21 (4) (b) a release of a power offending section 21 must not, if it is to secure the exemption, be made in return for any consideration or benefit to the settlor "nor the wife or husband of the settlor." If these words include present or future wives or husbands of the settlor the parties are on the horns of a dilemma. For if so, either the court will not authorise the release of the power because it is not for the benefit of such future wives or it will authorise the release of the power in return for a benefit to the future wives, but the benefit will exclude the relief under section 21 (4). It may be that the reference in section 21 (4) (b) to the wife of the settlor means the present wife of the settlor. For there is no reference in section 21 (4) to the future, as there is in section 404 (2) of the Income Tax Act (*b*). At any rate that would appear to be the view of the Revenue, as the Solicitor-General indicated in the debate on the Finance Bill that the jurisdiction under the Variation of Trusts Act would be available in such circumstances (*c*). It is to be hoped that the Revenue Authorities will be prepared to give an assurance that this is their view before any application is made under the new Act.

(*b*) But *cf. I. R. C.* v. *Tennant* (1942) 24 T.C. 215.
(*c*) *Hansard*, July 15, 1958, col. 1066.

MATRIMONIAL CAUSES (PROPERTY AND MAINTENANCE) ACT, 1958

By John L. M. Bowyer, Barrister-at-Law

The effect of this Act is to get rid of four serious restrictions on the court's statutory powers to deal with claims between spouses and ex-spouses. The new Act removes any time-limit from the power of the court to make orders for secured provision, maintenance and alimony under the Matrimonial Causes Act, 1950; enables the court to set aside certain dispositions made with the intention of defeating claims made under that Act; places an ex-spouse of a deceased person in a position corresponding with that of a dependant under the Inheritance (Family Provision) Act, 1938, as amended by the Intestates' Estates Act, 1952; and extends the scope of the court's jurisdiction under section 17 of the Married Women's Property Act, 1882, to cases where there may be no property or identifiable fund in existence at the date of the order. These considerable changes in the law will be considered below in the order in which they are made by the new Act, which is to come into operation on such day as may be appointed by the Lord Chancellor by an order made by statutory instrument (section 9 (2)).

1. "on" a Decree Becomes "on or at any time after"

The powers conferred on the court by the Matrimonial Causes Act, 1950, ss. 19 (3) and (4), 20 (2) and 26 (3), to make orders for secured provision, maintenance or alimony have hitherto been circumscribed by the fact that under each of these provisions the respective orders could only be made "on" the decree in question. Although the court has exercised its discretion to grant leave to apply for such orders several years after a decree in special circumstances (*a*) this has, in fact, proved a serious bar to otherwise justifiable claims for relief (*b*).

Section 1 of the new Act will make it possible for the court to make orders under the above-mentioned provisions of the Act of 1950 either on or at any time after a decree (by which is meant

(*a*) As in *Fisher* v. *Fisher* [1942] P. 101.
(*b*) See *Scott* v. *Scott* [1921] P. 107 and the reference to *Shott* v. *Shott* [1952] 1 All E.R. 735 in (1957) 21 Conv.(N.S.) 351.

a decree nisi) has been made, although this will not debar the court from taking into account in the usual way any delay in making or proceeding with the application (subs. (5)).

2. Anti-Avoidance Provisions

Any disposition made at any time after the commencement of the new Act by any person who has been married may run the risk of being dealt with, on the application of his or her spouse or ex-spouse, rather like a fraudulent preference of creditors under the Bankruptcy Act, 1914. Section 2 of the Act empowers the court to set aside any disposition made by a spouse or ex-spouse within the period of three years ending with the date of an application under the section with the intention of defeating an application by the other party to the marriage for relief under sections 19 (2) or (3), 20 (2) (3) or (4), or 23 of the Act of 1950, and not being a disposition for value to a bona fide purchaser for value without notice of any such intention. This intention will be presumed, unless the contrary is proved, if the court is satisfied that the disposition in question would have the effect of defeating such a claim, or, where an order under any of the above-mentioned provisions of the Act of 1950 has already been made, if the court is satisfied that the claim on which the order was made has in fact been defeated by the disposition.

3. Family Provision for Ex-Spouses

Under the Inheritance (Family Provision) Act, 1938, as amended by the Intestates' Estates Act, 1952 (the Act of 1938 as so amended being hereinafter referred to as "the Family Provision Act"), a former spouse of the deceased did not come within the class of "dependants" who could apply to the court for provision out of the deceased's estate. Now, by sections 3 to 6 of the new Act, the former wives or husbands (all of them) of the deceased join the ranks of those entitled to apply for such provision. To all intents and purposes, these ex-spouses will be dependants of the deceased within the meaning of the Family Provision Act. They will be entitled to the same relief, and the court must have regard to the same factors when hearing their applications (save that it must also have regard to whether any and what applications and orders have been made under section 19 (2) or (3) of the Act of 1950). But they are not, technically, "dependants" within the Family Provision Act, and any application by them must be made not as such dependants but as applicants under the new Act. However, the only differences (and these are slight) between their

position and that of "dependants" of the deceased are not disadvantageous ones. For example, the proviso to section 1 (1) of the Family Provision Act (preventing applications by dependants where the surviving spouse of the deceased is entitled under his will or intestacy to at least two-thirds of the income of his estate and where the only other dependants are children of the surviving spouse) does not apply, for obvious reasons, to the new class of applicants. Nor do the requirements of the Family Provision Act for the exercise of the court's discretion to extend the time for application beyond the six months' period from grant of representation (see s. 2 (1A) of the Family Provision Act) apply to applications under the new Act: instead, such applications can be made "with the permission of the court, after the end of that period but before the administration and distribution of the estate have been completed" (proviso (b) to s. 3 (1)). Now, too, along with "dependants" under the Family Provision Act, all ex-spouses of deceased persons, and not merely those having a claim under section 2 of the Maintenance Agreements Act, 1957, will be potentially "interested in the estate of the deceased" for the purposes of obtaining grants of administration under section 162 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925. (See section 6 (3) of the new Act.)

4. Tunstall *v.* Tunstall Overruled

Section 17 of the Married Women's Property Act, 1882, gives the court jurisdiction, where there is any question between a husband and wife as to the title to or possession of property, to make such order as the court thinks fit with respect to the property in dispute. In *Tunstall* v. *Tunstall* (*c*) the Court of Appeal held that where there was no property or identifiable fund on which an order under section 17 could operate, proceedings under that section were inappropriate. Section 7 of the new Act, overruling this decision, now extends the jurisdiction under section 17 of the 1882 Act by enabling the court to make a money judgment thereunder in respect of property no longer under the possession or control of the husband or wife, and either party to apply for relief under section 17 wherever it is claimed that the property was formerly in the possession or control of the other, whether or not the applicant knows that it has ceased to be in such possession or control.

(*c*) [1953] 1 W.L.R. 770; applied in *Re Camkin's Question* [1957] 1 W.L.R. 255; see also *Re Bettinson's Question* [1956] Ch. 67.

5. Some Comments on the New Act

The Act gives effect to some major recommendations of the Royal Commission on Marriage and Divorce (*d*) by curing several notorious defects in the law of husband and wife. The all-too-frequent use, in this summary of its provisions, of the word " spouse " is sufficient indication of the manner in which the Act continues to fulfil the Commission's insistence on the equalisation of the position between the sexes. A possible omission lies in the apparent failure to apply the anti-avoidance provisions of section 2 (*e*) to dispositions made with the intention of defeating applications under the Maintenance Agreements Act, 1957, for the variation of financial arrangements contained in such agreements made on separation or divorce, or for the insertion of financial provisions in such agreements. Section 8 (2) does, however, provide that references to other Acts include amendments to them.

As to procedure, it would seem that there is a strong case for assigning to the Chancery Division applications by ex-spouses of a deceased person under sections 3 to 6 for provision out of his or her estate. The writer's suggestion of a similar course in respect of the Maintenance Agreements Act, 1957 (*f*), was not followed, all applications thereunder being now assigned to the Probate, Divorce and Admiralty Division (*g*). But while there were resemblances between applications under section 2 of the Act of 1957 and those under the Family Provision Act, the latter Act is in practically every respect, apart from age, the identical twin of the family provision sections of the new Act (*h*). Under the Rules already made, cases may well arise where, for example, a widow finds herself entitled to make interdependent applications in both Divisions at the same time under the Act of 1957 and the Family Provision Act respectively. But it would surely be somewhat bewildering for the personal representatives of a deceased person to find themselves beleaguered on the one side by applications in the Divorce Division for provision out of the deceased's estate and on the other by precisely similar applications in the Chancery Division.

(*d*) (1956) Cmd. 9678.
(*e*) See para. 1, *supra*.
(*f*) (1957) 21 Conv.(N.S.) 355.
(*g*) The Matrimonial Causes (Maintenance Agreements) Rules, 1957 (S.I. 1957, No. 2202), r. 2.
(*h*) See para. 3, *supra*.

A "TABLE A" FOR SETTLEMENTS

By Timothy Jones, Barrister-at-Law

A problem in drafting a modern settlement is to produce a document sufficiently short for the settlor to comprehend.

The settlement may be designed to continue for anything up to eighty years, and to secure the bulk of the family fortune during this period from unnecessary tax and estate duty. To do this it must be flexible, and to be flexible it will be lengthy. Powers inserted in settlements have a habit of receiving a narrower judicial construction than the draftsman hoped: each new decision on the scope of a power usually results in some additional phrases being added to the form currently in use. Each time the practitioner meets some problem in connection with an existing settlement he adds a new clause to the next settlement he drafts to remove the difficulty. Nearly every Finance Act requires some new formula to re-open the loop-hole which has been stopped. So the draftsman's stock of settlement forms perpetually grows. And when a new settlement has to be prepared it seems a pity to exclude from the draft any clause which might come in useful, merely for the sake of brevity. But the point comes where the settlor cannot understand his own settlement. It is purely a question of length. However clear the style, after a certain number of clauses a layman is hypnotised by the language and loses the thread. The provisions he is mainly concerned to see may be simple; a discretionary trust of income for a given period, followed by a trust of capital at the end of the period; a power to advance capital; and a power for him to appoint trustees. But these are hidden behind recitals of facts he already knows, and behind a trust for the sale of property which he intends the trustees to retain, and among powers to do everything except put the trust fund on a horse.

If the settlement cannot be shortened without sacrificing its usefulness the only remedy is to use some fine print. Many other kinds of transactions incorporate standard forms of clauses or conditions, from Table A in the Companies Acts to the printed form of conditions used by a particular company in, say, an insurance policy or a hire-purchase agreement. The layman can read all the fine print if he wishes, but he is usually content to have his attention called to its salient points. It enables him to read in the first place the special provisions that chiefly interest

him, without losing the thread. And by easing the draftsman's work it reduces the risk of errors in drafting.

The precedent on page 750 is an attempt to apply this method to family settlements, by collecting all the administrative or similar provisions in a schedule, and in a form which can be attached as it stands to most types of settlement. (Its length is probably no drawback. It is in fact less than a third of the length of some of the published general conditions used in the sale of land—a transaction less complex than a family settlement.) The body of the settlement then need only contain (i) a definition clause (where necessary), (ii) a clause incorporating the schedule, (iii) the beneficial trusts of income and capital, with any express powers of appointment or advancement, and (iv) any express powers of appointing trustees. And as a result it will be comparatively simple.

NOTES OF RECENT CASES

1. *TRUSTS*

By F. R. Crane, ll.b., Solicitor

Prescott (orse. Fellowes) v. *Fellowes* [1958] 3 W.L.R. 288; [1958] 3 All E.R. 55 (C.A.)

Variation of settlement—whether gift can be a settlement—Matrimonial Causes Act, 1950, *s.* 25.—The Court of Appeal (Hodson, Romer and Sellers L.JJ.) has reversed the decision of Stevenson J. (noted *ante,* p. 229, where the facts are given). Hodson and Romer L.JJ., delivering the two principal judgments (with which Sellers L.J. concurred), carefully reviewed the more recent cases which have defined a " settlement " for the purposes of the Matrimonial Causes Act, 1950, s. 25.

The learned Lords Justices agreed that the word " settlement " in section 25 (*supra*) (and in its predecessors) has a much wider meaning than that normally given to it in conveyancing language. Nevertheless, on principle, it could not include an outright gift, whether made in consideration of marriage or not.

" The payments made to a spouse in his or her character as a spouse give to those payments the qualification of nuptial, but it does not follow that every payment made and every present given by one spouse to the other constitutes settled property. Were it so, highly inconvenient results would follow . . ." (*per* Hodson L.J. [1958] 3 W.L.R. at p. 294; [1958] 3 All E.R. at p. 58).

" . . . an out-and-out and unqualified transfer of property by one spouse to the other cannot be regarded as a ' settlement ' of that property for any purpose whatever. It is indeed the very antithesis of a settlement and, widely though section 25 and its predecessors have been construed by the courts, the expressions ' settlement ' and ' property settled ' do in fact appear in the section and cannot be wholly ignored " (*per* Romer L.J. [1958] 3 W.L.R. at p. 301; [1958] 3 All E.R. at p. 63). Moreover, they regarded the point as settled in the above sense by the earlier decision of the Court of Appeal in *Hubbard* v. *Hubbard* [1901] P. 157. On the other hand, any provision containing an element of " periodicity," such as a covenant for the payment of an annuity, does normally constitute a settlement: *Borthwick* v. *Borthwick* [1927] P. 64. In the instant case the failure of various provisions for a loan by the wife to the husband, leaving only the absolute gift, removed the transaction from the category of settlements.

The Court of Appeal then proceeded to consider some recent decisions in the light of these principles. They disapproved of the conclusions reached in *Smith* v. *Smith* [1945] 1 All E.R. 584 and *Halpern* v. *Halpern* [1951] P. 204, in which cases ownership of the matrimonial home as joint tenants or tenants in common was held to constitute a settlement; it would seem that *Bacon* v. *Bacon* [1947] P. 151, not mentioned here, also proceeded on an erroneous basis.

Hodson L.J. further approved the decisions on *Parrington* v. *Parrington* [1951] 2 All E.R. 916, where a continuing liability to make payments under a bond was treated as a settlement, and *Hindley* v. *Hindley* [1957] 2 All E.R. 653, where out-and-out payments were held not to be a settlement.

The distinction drawn in this case by the Court of Appeal seems as clear as is likely to be possible, and should therefore be of assistance in future cases. The refusal to regard joint tenancy or tenancy in common as *per se* creating a settlement is, it is submitted, of considerable importance. The conclusion reached seems to be consonant with the decisions under the Married Women's Property Act, 1882, s. 17. There, it will be recalled, the court will give effect to titles that are clear, and make a division based on equality if there is real uncertainty and dispute (see *Silver* v. *Silver* [1958] 1 W.L.R. 259; [1958] 1 All E.R. 523, C.A., noted *ante*, p. 275). So if a husband purchases property in his wife's name, or in their joint names, there is a presumption of advancement as to the whole or half; unless this can be rebutted, the husband cannot obtain any relief under the Married Women's Property Act, 1882, s. 17, or under the Matrimonial Causes Act, 1950, s. 25.

G. L. Baker, Ltd. v. *Medway Building and Supplies, Ltd.*
[1958] 2 All E.R. 532 (Ch.D.)

Trust — breach of trust — following trust money — limitation of action against trustees—effect of fraud—Limitation Act, 1939, *ss.* 5, 19, 26.—The plaintiff company permitted T., its accountant, to receive substantial sums of money on its behalf. In 1950 T. paid part of this money, without authority, to the defendant company, of which he was a director. The plaintiffs now sought reimbursement from the defendants.

Danckwerts J. held, first, that the basic principle was that stated by Denning J. (as he then was) in *Nelson* v. *Larholt* [1948] 1 K.B. 359 at p. 340: "If it [a man's money] is taken from the rightful owner, or indeed from the beneficial owner, without his authority, he can recover the amount from any person into whose hands it can be traced unless and until it reaches one who receives it in good faith and for value and without notice of the want of authority." In the present case the defendants acted in good faith and without notice, but Danckwerts J. held that on the pleadings and facts they could not prove they had given value. Consequently, the defendants were thrown back on the Limitation Act, 1939, as a second line of defence, but without success, for the learned judge held that plaintiffs could avail themselves of one or other of two exceptions.

An action by a beneficiary to recover trust property or for breach of trust is prima facie barred after six years from the accrual of the right of action (Limitation Act, 1939, s. 19 (2)). But no period of limitation at all applies where the action is "in respect of any fraud or fraudulent breach of trust to which the trustee was party or privy" (Limitation Act, 1939, s. 19 (1)). Danckwerts J. said that it was uncertain whether this subsection applied to actions against persons claiming through trustees; he himself considered the wording wide

enough, while the Trustee Act, 1888, s. 8 (1), replaced by s. 19 (1) of the 1939 Act, had specifically referred to actions against persons claiming through trustees. It may be noted, however, that in Preston and Newsom's *Limitation of Actions* (3rd edition at p. 180) it is said, in regard to section 19, that the fraud must be imputable to the person who invokes the statute, citing *Thorne* v. *Heard* [1895] A.C. 495, where the defendants were held not to be affected by the fraud of their solicitors who misappropriated moneys received on their behalf. Apart from this point, however, Danckwerts J. held that the defendants could rely on section 26 of the Limitation Act, 1939, whereby if the action is based on "the fraud of the defendant, or his agent, or of any person through whom he claims," or the right of action is concealed by the fraud of such person, time does not begin to run until the fraud has been or could reasonably have been discovered. On the facts in the present case, the wrongful payments had been so concealed until either 1951 or 1956, but in any event to a date within six years of the issue of the writ (referring to *Beaman* v. *A.R.T.S.* [1949] 1 K.B. 550). Consequently, the plaintiffs succeeded.

2. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

Re Gillingham Bus Disaster Fund; Bowman v. *Official Solicitor* [1958] 3 W.L.R. 325; [1958] 2 All E.R. 749 (C.A.)

Charitable Trusts (Validation) Act, 1954, *s.* 2 (3)—*severability.*—The Court of Appeal have affirmed the decision of Harman J. ([1957] 3 W.L.R. 1069, see (1958) 22 Conv.(N.S.) 145–147) and held that the unexpended contributions to the Medway Towns cadet disaster fund are returnable to the donors on a resulting trust. In the Court of Appeal the argument was based on the 1954 Act which followed the "Diplock" cases. It was no longer argued that the fund was purely charitable; in fact it was collected for two objects, neither of which was technically charitable, *i.e.*, the benefit of the individual cadets and their families, and "other worthy causes." Had the whole fund been destined for "worthy causes" (void for uncertainty) it would possibly have been covered by the Act of 1954, since some worthy causes are charitable, and the whole fund could therefore have been devoted to charitable objects. The snag lay in the joint nature of the objects of the fund; it was never intended that the cadets and their families should not be the primary objects of the gifts. The only solution was in some way to sever the fund into parts, saying that some fraction or sum was intended for the "worthy objects" and the rest for the individual sufferers. The Court of Appeal found it impossible to do this. The majority even refused to consider whether the appeal and the resulting gifts constituted an "imperfect trust provision," since they were not satisfied that they had any power to help under the Act. Section 2 (3) of the Act specifically provided for cases where, under an imperfect

trust provision, a disposition was made " creating interests " for more than one purpose. Had the Act simply referred to dispositions in favour of more than one object or group of objects the question would have been easily solved. But the draftsman introduced, presumably for some good reason, a requirement that " interests " be " created." He could not have meant enforceable interests, as the whole point of the 1954 Act is to save gifts which would otherwise fail for uncertainty. He must, then, have meant an attempt to confer a separate interest on more than one object. This brought in, by a side wind, the whole law of estates and interests in property. Does a direction to apply a fund to two objects, with no power to exclude the first, create an interest in favour of the second? Lord Evershed M.R. and Romer L.J. held that it did not. The Master of the Rolls could find no trace of a proprietary interest for worthy causes, and the Lord Justice considered that a coin put into a collecting box could not be regarded as divided into several separate interests for several different objects. This conclusion is, with respect, consistent with the curious wording of the Act, but it led to a technical decision out of harmony with the equitable rules governing charities. Ormerod L.J., who dissented, saw no difficulty in treating all sums not spent on the individuals as given for the " worthy causes " and it is now for the House of Lords to decide whether classical conveyancing concepts are to be introduced into this field of equity.

(Theobald 351–352)

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3. *LANDLORD AND TENANT CASES*

By D. Macintyre, m.a., Barrister-at-Law

Granada Theatres, Ltd. v. *Freehold Investments (Leytonstone), Ltd.* [1958] 1 W.L.R. 845; [1958] 2 All E.R. 551 (Ch.D.)

Repairs—" structural repairs of a substantial nature "—meaning. —The tenants in this case covenanted to keep the demised premises in good and substantial repair, but they were expressly absolved from all liability for " structural repairs of a substantial nature to the main walls, roofs, foundations or main drains of the demised building." The landlords covenanted (except in so far as the tenants were liable under the tenants' covenants) " to repair, maintain and keep the main structure, walls, roofs and drains of the demised premises in good structural repair and condition at all times during the said term." The decision turned upon the true construction of the phrase " structural repairs of a substantial nature."

Vaisey J. defined the term " structural repairs " (which had never been judicially defined before) as " repairs to a structure." " Substantial," he held (applying a definition of the word given by the House of Lords in another connection in *Palser* v. *Grinling* [1948] A.C. 291), is equivalent to " considerable," what is " considerable " being a question of fact in each case. But in deciding the question of liability between landlord and tenant one must have regard to the

nature of the antecedent disrepair rather than the nature of any repairs done, since, if that were not so, a relatively small amount of structural disrepair might be put right so extravagantly that the repair, viewed by itself, might well be substantial.

In the present case the state of disrepair of the roof and of a main wall (which must both clearly be part of the structure of a building) called for repairs which were clearly considerable. The landlords were therefore responsible for these repairs.

City of Westminster Properties (1934), Ltd. v. *Mudd*
[1958] 3 W.L.R. 312; [1958] 2 All E.R. 733 (Ch.D.)

Covenant—construction—surrounding circumstances—waiver of covenant—promise not to enforce covenant—rectification.—This was an action for forfeiture of a lease for fourteen years from Lady Day, 1947, on the ground that the tenant was residing on the premises in breach of a covenant "to use the demised premises as and for showrooms, workrooms and offices only and not to use, exercise or carry on or permit to be used, exercised or carried on in or upon the said premises or any part thereof" certain specified trades or businesses. The tenant claimed (1) that upon the true construction of the lease in the light of the surrounding circumstances he had not broken the covenant at all; (2) alternatively, that the landlords had waived the covenant; and (3) that in any event the landlords had agreed not to enforce the covenant against him. He also claimed rectification of the lease.

The premises consisted of a ground-floor shop and basement (described in the lease as a lock-up shop) which formed part of a block of residential flats: and the tenant had occupied the demised premises since 1941, first for a term of three years, in respect of which no written agreement was produced, and then under a lease for three years from Lady Day, 1944, which contained a covenant by the tenant not to use or permit the use of the premises except as a shop for his business of antique dealer. It was admitted, however, that the tenant had been allowed to sleep in a back room behind the shop from 1941 to 1944: and it was found as a fact that the landlords knew that he slept there from 1944 to 1947; but they did not know that he was, by that time, using the premises as his residence, having fitted up the basement for that purpose. When the new draft lease was prepared in 1947, the covenant upon which the action was brought, as originally drafted, ended with the words "and not to permit or suffer the demised premises or any part thereof to be used as a place for lodging, dwelling or sleeping": but these words were struck out of the draft by the tenant, and, after protracted negotiations, in the course of which the tenant refused to sign the lease with a clause about not sleeping there and the landlords refused to insert a clause permitting this, the tenant eventually signed the lease (which finally contained no reference to sleeping on the premises), upon being given an oral undertaking by the landlords' agent that the landlords would make no objection to his continuing to live there. In 1956, however, after the managing

director of the landlords had discovered that the tenant was using the premises as his residence, the landlords issued a writ.

Upon the question of construction, Harman J. held that it was not permissible to look into the past history of the matter, nor to rely on the fact that the tenant had been living on the premises to the knowledge of the landlords. Nor, in his judgment, was it possible to take account of the fact that the express words of prohibition which had appeared in the original draft had been struck out. But the nature of the demised premises is a "surrounding circumstance" which can be taken into account. If, therefore, the premises (like those in *Levermore* v. *Jobey* [1956] 1 W.L.R. 697; [1956] 2 All E.R. 362 and in *R.* v. *Brighton and Area Rent Tribunal, ex p. Slaughter* [1954] 1 Q.B. 446) had been adapted in part for residential purposes, it would have been possible to confine the operation of the covenant to that part of the premises which was in fact used for business purposes. The shop and basement in the present case, however, were not, on the face of it, suitable for use as a dwelling-house.

Nor was there any evidence that the landlords had waived or released their rights. They had, indeed, by acceptance of rent waived their right to enforce forfeiture for past breaches of covenant. But residence contrary to the covenants in a lease is a continuing breach of covenant, and there was no evidence that the landlords' rights under the covenant had been released.

But the landlords had, through their agent, entered into a contract not to enforce the covenant against the defendant personally, so long as the defendant continued to occupy the shop. The landlords' promise had been made before the lease was executed, and the tenant would not have signed the lease had that promise not been made. Upon this ground alone the defendant succeeded.

The claim for rectification of the lease failed because, even if the tenant and the landlords' agent had both intended that the tenant should be allowed to reside on the premises, they did not intend a provision to that effect to be inserted in the lease.

Lyons v. *Central Commercial Properties London, Ltd.*
[1958] 1 W.L.R. 869; [1958] 2 All E.R. 767 (C.A.)

Landlord and Tenant Act, 1954—business premises—application for new tenancy—opposition by landlord on ground of breach of repairing covenants — discretion of court to grant or refuse new tenancy—nature of discretion.—The decision in this case turned upon the meaning of the words "ought not to be granted a new tenancy" in section 30 (1) (a) of the Landlord and Tenant Act, 1954, serious breaches of the tenant's repairing covenants in the lease being admitted. The Court of Appeal held that a court clearly has a measure of discretion in these cases; but they rejected the submission of counsel for the landlord that this is merely a discretion to determine as to the substantiality of the tenant's failure to repair, so that when once the court has found a serious or substantial failure, it is bound to refuse a new tenancy. With regard to the exact nature of

the discretion Morris L.J. did not think it advisable to say more than that " once a court has found the facts as regards the tenant's past performances and behaviour and any special circumstances which exist, then, while remembering that it is the future which is being considered, in that the issue is whether the tenant should be refused a new tenancy for the future, the court has to ask itself whether it would be unfair to the landlord, having regard to the tenant's past performances and behaviour, if the tenant were to enjoy the advantages which the Act gives to him." Ormerod L.J., without attempting to define the precise limits of the discretion, thought that the judge " may have regard to the conduct of the tenant in relation to his obligations, and the reasons for any breach of covenant to repair which has arisen." Harman J. thought that the discretion is a narrow one; and that it is limited to the question whether, " having regard to the tenant's past conduct as a tenant, it would be equitable to exclude the landlord from his property for a further term or to foist the tenant on him contrary to the contract." He pointed out, however, that when once the court has decided to grant a new tenancy the discretion is wider (see sections 33 and 35).

It was also held that the fact that the tenant had sold his interest to a third party, who would get the benefit of any new tenancy granted, and who in this case was financing the application, should not be considered.

The decision in this case would also appear to apply, and indeed was treated by the court as applying, to cases where the landlord's opposition to a new tenancy is based on the tenant's persistent delay in paying rent and on other substantial breaches by the tenant of his obligations (see section 30 (1) (b) and (c)).

Espresso Coffee Machine Co., Ltd. v. *Guardian Assurance Co. Ltd.*
[1958] 1 W.L.R. 900; [1958] 2 All E.R. 692 (Ch.D.)

Landlord and Tenant Act, 1954—*business premises—application for new tenancy—landlords' intention to occupy holding for their own purposes—whether necessary intention shown.*—The landlords in this case opposed an application for a new tenancy on the ground stated in section 30 (1) (g) of the Landlord and Tenant Act, 1954, namely, that on the termination of the current tenancy they intended to occupy the holding for the purposes of a business to be carried on by themselves. At the time when they served their notice of opposition they clearly had this intention: but it appeared from the evidence that they were also exploring the possibilities of a tenancy of other premises in the course of erection nearby, and counsel for the tenants argued that the possibility of that chance materialising must have unsettled the minds of the landlords so that they no longer had an intention of the necessary quality to rank as an intention under the Act. The board of directors of the landlord company had, however, passed a resolution, after the possibility of obtaining a lease of the other premises had already been raised, expressing their intention to occupy the tenants' premises: and they were also willing to give an undertaking to the court to occupy them at the end of the current

tenancy. Counsel for the tenants, however, questioned the value of that resolution on the ground that the directors had not realised the full extent of the delays which his clients could lawfully, and fully intended to, impose. Harman J. refused to grant a new tenancy. He found on the evidence that the landlords had an honest, present and real intention at the time of the hearing to occupy the premises. They had given an undertaking to the court, which they had power to honour: and they were not the sort of company whose undertakings the court would hesitate to accept. They might, indeed, be so harassed by the tenants that they would change their minds at some later date: but they did not have to prove that they would still have the requisite intention in the future.

Grace Rymer Investments, Ltd. v. *Waite* [1958] 3 W.L.R. 337; [1958] 2 All E.R. 777 (C.A.)

Rent Acts—premium—rent paid in advance—subsequent mortgage of landlord's interest—validity of tenancy against mortgagee.—The decision of Danckwerts J. in this case (noted at p. 149, *ante*) has now been affirmed by the Court of Appeal. In addition to the points raised in the court below, counsel for the mortgagee argued that the advance payments made by the tenants had, for the purposes of the Law of Property Act, 1925, and the general law, lost all the characteristics of rent and were merely premiums, so that the tenants were in no better position than licensees or tenants at will. It was held, however, that since each payment represented a definite number of weeks' rent, the tenants must for the purposes of the general law (whatever the position may have been under the Landlord and Tenant (Rent Control) Act, 1949) be treated as having paid rent for the requisite periods.

Leave to appeal to the House of Lords was refused.

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4. *REVENUE CASES*

By David R. Stanford, m.a., ll.b., Barrister-at-Law

(*Note*:— Where a case is not reported in any of the general series of law reports it is cited from *Taxation Reports* (T.R.).)

Jennings v. *Kinder; Hochstrasser* v. *Mayes* [1958] 3 W.L.R. 215; (1958) T.R. 237 (C.A.)

Income Tax—Benefit to employee—Agreement collateral to service contract.

Statutory provision: Income Tax Act, 1952, s. 156 and Sched. IX, r. 1.

Point: The Court of Appeal, Parker L.J. dissenting, have affirmed the decision of Upjohn J. (noted *ante*, Vol. 22, p. 154) that certain

benefits granted to its employees by I.C.I. under their housing scheme are not taxable emoluments. Although Parker L.J. dissented, such was not due to any disagreement as to the law relating to the matters in issue, but merely on the application of the law to the facts of the particular case. The court accepted that the profits of an office or employment include every sum in money or money's worth paid by an employer to an employee during his employment in his capacity as employee and for no consideration moving from the employee other than services which he renders. From this broad category there is to be excepted testimonials of the kind considered in *Seymour* v. *Reed* [1927] A.C. 554 and casual birthday, Christmas and wedding presents, and like payments. The court also accepted the converse proposition that a payment made by an employer to an employee for a consideration other than services is not a profit of the employment, albeit made during the continuance of the employment.

The company ran a housing scheme available to all employees, but to no one else. Under the scheme, employees were given interest-free loans for house purchase and the company undertook that should the employee be transferred and the house sold, the company would bear any loss incurred on the resale. Should the employee desire to sell or let the house, the company had a right of pre-emption at market value. The employee had to keep the house in repair. Jenkins and Pearce L.JJ. came to the conclusion that the housing scheme was an independent bargain between any employee and the company. The company gained the benefit of ensuring its employees were well housed and ensuring the availability of houses for any new employee. Consideration thus given to the company was independent of the services rendered by the employee. Employment was a *causa sine qua non* of the benefit received by the employee but was not the *causa causans*. Thus, when an employee on being transferred sold his house with the consent of the company at a loss, and such loss was reimbursed by the company, the amount paid to the employee by the company was not a taxable emolument. Such payment was not a reward for the services, although it was an advantage to the employee wholly collateral to his service with the company. The test of whether the benefit accrues by virtue of the office must be looked at from the standpoint of the recipient. In the present case, the reimbursement of the loss from the standpoint of the employee was neither a profit nor received by virtue of his employment, but by virtue of the housing agreement.

Bullock v. *Unit Construction Co., Ltd.* [1958] 3 All E.R. 186; (1958) T.R. 277

Income Tax—Company—Residence—Subvention payment

Statutory provision: Finance Act, 1953, s. 20 (9).

Point: In *Union Corporation, Ltd.* v. *C. I. R.* [1952] 1 All E.R. 646, the Master of the Rolls stated the rule as to residence in the following manner, namely, " the company may be properly found to reside in a country where it ' really does business,' that is to say, where the central power and authority, which, according to the

ordinary constitution of a limited liability company, is vested in its board of directors, and the exercise of that power and authority is to some substantial degree to be found." Although it is clear that a company may reside in more than one place (*cf. Swedish Central Railway Co., Ltd.* v. *Thompson* (1925) 9 T.C. 342), the division of control to cause such dual residence must be within the framework of the constitution of the company concerned. In other words, the power must be divided and the acts of control relied on as constituting residence in any country must be done within the constitution of the company. Mere *de facto* power exercised by the threat of using some ultimate sanction, such as the use of votes of sufficient number to alter the board of directors, is not sufficient to cause the company to be resident in the country where the persons entitled to exercise such votes reside.

Facts and decision: A company resident in England had three subsidiary companies incorporated and registered in Kenya, which carried on business in Kenya. The constitution of the Kenya companies was such that the members of their boards of directors were resident in Kenya and board meetings and general meetings could not be held in the United Kingdom. The control of the business of each of the three Kenya companies was vested in the directors by the Articles of Association of the company concerned. The Kenya companies, being then clearly resident in Kenya, and nowhere else, made losses and the directors of the English company determined to take over the management of the Kenya companies. Under threat of removal of the directors of those companies, the directors of the English company in fact issued the instructions and orders upon which the Kenya companies acted. The board of the English company conveyed instructions to the boards of the subsidiary companies, which instructions were accepted although, of course, the boards of the Kenya companies could have refused to be bound by the instructions. The English company made payments to the Kenya companies purporting to be subvention payments and thus deductible from the profits of the English company for tax purposes. For such payments to be subvention payments within the meaning of Finance Act, 1953, s. 20, it is essential that the recipient company in each case should be resident in the United Kingdom.

Held: The Kenya companies were not resident in the United Kingdom. The irregular interference by the parent company in the affairs of each subsidiary, although backed by the ultimate sanction of control of the constitution of the board, was not the exercise of authority within the framework of the constitution of the subsidiary concerned.

Pye-Smith v. *C. I. R.* [1958] 3 W.L.R. 905; [1958] 2 All E.R. 785

Estate Duty—Surrender of life interest—Renunciation of bonus shares

Statutory provisions: Finance Act, 1940, s. 43 (1), as amended.

Point: A shareholder who becomes entitled to an allotment of bonus shares pursuant to a capitalisation of profits carried out by the

company may prior to such allotment and, even though he has a power to renounce the allotment in favour of some other person, be the owner in equity of the bonus shares prior to the renunciation or allotment. In consequence, if such shares are to be allotted to the trustees of a settlement as shareholders in the company, the life tenant under the settlement may have an equitable interest in the bonus shares. That interest, if disposed of by the life tenant causing the trustees to renounce the shares with her consent, would be a sufficient interest to bring section 43 of Finance Act, 1940, as amended, into operation and thus cause a charge to estate duty on such shares, should the life tenant fail to survive the disposition by five years.

Facts and decision: Trustees held a fund of ordinary shares upon trust for a wife for life and then, subject to a power of appointment held by the wife, for the two children of the wife in equal shares. The company passed a resolution to capitalise profits in paying up ordinary shares of the company to be distributed amongst the members as fully paid up, so that such members should receive one such ordinary share for every ordinary share held by them. A person appointed by the directors in accordance with the Articles then signed an agreement with the company providing for the allotment of the new shares. The directors passed a further resolution that the new shares be allotted in accordance with the provisions of the agreement and that the letters of allotment thereof with forms of renunciation thereon be sent out to the registered holders of shares in the company. The agreement provided *inter alia* that the company should allot and issue to each of the persons named in the schedule thereto (which schedule included the names of the trustees) or their nominees the number of new ordinary shares set opposite his or her name in the schedule. A letter of allotment containing a form of renunciation was received on August 1, 1952, by the trustees. The trustees completed a form of renunciation in favour of the two children of the wife on August 9.

Prior to such renunciation the wife executed a document releasing her power of appointment and then releasing her life interest in favour of her children by providing that she "hereby surrenders unto the Trustees all that her life interest in 10,000 new fully paid ordinary shares . . . which but for the provisions of this Deed would become subject to the trusts of the Settlement to the intent that such life interest may be merged in the capital of such shares and that the Trustees shall forthwith stand possessed of such shares in trust for" her two children absolutely. The wife died some four years later and the Revenue claimed duty on the bonus shares under Finance Act, 1940, s. 43.

Held: That the Revenue's claim was correct. As a result of the resolutions passed by the company and the directors, and the agreement signed on behalf of the ordinary shareholders, there was a binding agreement between the company and the ordinary shareholders for an allotment of the bonus shares to the existing shareholders, although such shareholders might renounce their rights to have the shares issued to themselves. The allotment letter sent to the trustees made an allotment of such shares, although the trustees were given power to avoid the effect of the allotment in favour of someone else. The trustees, and through them the wife, had therefore an

equitable interest in the shares at the latest on August 1. Thus, the wife had an interest limited to cease on her death which was disposed of and determined. If there had been no such disposition or determination the shares in which her interest subsisted would have passed on her death under section 1 of Finance Act, 1894, and hence were dutiable by virtue of Finance Act, 1940, s. 43 (1).

Fry v. *C. I. R.* [1958] 3 W.L.R. 381; [1958] 3 All E.R. 90 (C.A.)

Estate Duty—Interest in expectancy falling into possession

Statutory provisions: Finance Act, 1894, ss. 2 (1) (a), 7 (6), 22 (1) (j).

Point: The Court of Appeal has now reversed the decision of Danckwerts J. (noted *ante*, Vol. 22, p. 243) as to the true construction of Finance Act, 1894, s. 7 (6). The court did so, relying upon the principle that, when it is faced with two possible constructions of legislative language, it is entitled to look at the results of adopting each of the alternatives respectively in its quest for the true intention of Parliament.

The question before the court concerned a trust fund settled by will on trust for a lady for life and after her death upon trust for her issue and in default of issue for her brothers, of whom there were four. One of the brothers predeceased the life tenant and his executors elected under Finance Act, 1894, s. 7 (6), to pay estate duty on his reversionary interest when it fell into possession. The life tenant having reached the age of 83 without issue, purchased the reversion from the three surviving brothers and the executors of the deceased brother. A declaration was sought from the court as to whether a claim for estate duty on the deceased brother's share should be made on the footing that his reversionary interest fell into possession on the purchase, or on the death of the life tenant, or whether no estate duty would ever be payable.

The duty under section 7 (6) had to be paid when the interest "falls into possession." The Crown contended that an interest in expectancy falls into possession when that event occurs upon the happening of which the interest was expectant in accordance with the terms of the instrument which created the interest. The executor, on the other hand, contended that the interest fell into possession upon the enlargement of the life tenant's enjoyment of the income of the fund into an absolute power of disposition of the fund itself; before that enlargement took place, it could be said that the reversion would fall into possession *in futuro* but after the enlargement the funds in which the interest had subsisted were transferable to the life tenant as her absolute property. The Court of Appeal felt that neither construction was obviously right or obviously wrong, but that the contention of the taxpayer was preferable in its results and effect should therefore be given to it. The court noted that on the Crown's view the executors might be called upon to pay duty at a time when they had no money with which to pay it.

The further question was then considered as to the amount upon which duty was payable at the date of the enlargement of the life tenant's interest. The Crown claimed duty on the whole fund, whereas the taxpayer sought to restrict the claim to the value of that which the life tenant did not possess before the enlargement of her interest. Although the court felt difficulty in reconciling the view that the reversionary interest fell into possession on the purchase by the life tenant with the further view that for the purpose of valuation the reversionary interest had still to be treated as an interest in remainder, nevertheless relying on the same principle of construction as before they found in favour of the taxpayer. To have adopted the Crown's view might have caused duty to be payable on a far greater sum than the amount of the purchase price paid for the reversionary interest to the executors.

It should be noted that in the present case the reversionary interest was treated as vested with no possibility of defeasance as the life tenant had reached the age of 83 without having had any issue.

Chick v. *Commissioner of Stamp Duties for New South Wales*
[1958] 3 W.L.R. 93; [1958] 2 All E.R. 623 (P.C.)

Estate Duty—Gift—Exclusion of Donor

Statutory provisions: Stamp Duties Act, 1920–1956 (N.S.W.), s. 102 (2) (d).

Point: The New South Wales Stamp Duties Act, 1920–1956, s. 102, provides that "... the estate of a deceased person shall be deemed to include and consist of the following classes of property:— ... (d) any property comprised in any gift made by the deceased at any time, whether before or after the passing of this Act, of which bona fide possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased or any benefit to him of whatsoever kind or in any way whatsoever, whether enforceable at law or in equity or not and whenever the deceased died." The wording of this clause may be compared with the United Kingdom Customs and Inland Revenue Act, 1881, s. 38 (2), as amended by Customs and Inland Revenue Act, 1889, s. 11 (1).

The conditions, therefore, for property which has been given away by the deceased to pass out of his estate for duty purposes are two, namely, the entire exclusion of the donor from the property and absence of benefit to the donor. The donor must be excluded immediately and also for all time thereafter. In consequence, the fact that he is excluded immediately but regains some possession and enjoyment at a later date is not sufficient to exclude the charge to duty. Further, the manner in which the donor regains possession or enjoyment is not material and it is no defence to liability that a new possession was gained by virtue of a commercial transaction. Further, although a "benefit" to be relevant may need to be connected in some way with the gift, such does not apply to the mode of retaking possession. Finally, it is the failure entirely to exclude the deceased that causes

the property to remain dutiable and it is immaterial that the donee has full possession and enjoyment if at the same time the donor is not entirely excluded.

Facts and decision: A father transferred to his son Clifford in 1934 a pastoral property known as *Mia Mia* and the son assumed bona fide possession and enjoyment immediately upon the gift. A year and a half later, however, the father, Clifford and another son entered into partnership as graziers and stock dealers. The partnership agreement provided, *inter alia*, by Clause 5, that the business should be conducted on the respective holdings of the partners and such holdings should be used for the purposes of the partnership only. *Mia Mia* was one of these holdings. By Clause 13 of the agreement it was specified that any and all lands held by any of the partners at the date of the agreement or acquired afterwards should be and remain the sole property of such partner and should not on any consideration be taken into account as or deemed to be an asset of the partnership and any such partner holding any such land should have and retain the sole and free right to deal with the same as he might think fit. In computing the value of the estate of the father, who died in 1952, the Commissioner included the value of *Mia Mia*.

Held: That the value of *Mia Mia* was rightly included in the estate of the deceased. Despite Clause 13 of the partnership agreement quoted above, it was clear that under Clause 5 the partners and each of them were in possession and enjoyment of the property so long as the partnership subsisted. Thus, although it was not in dispute that the donee Clifford assumed bona fide possession and enjoyment of the property immediately upon the gift, the donor, the father, regained possession and enjoyment on the creation of the partnership.

This decision does not affect the case where a property, shorn of certain of its rights which appertain to complete ownership, is given, provided that the donor is then entirely excluded from the property given, as was the case in *Munro* v. *Commissioner of Stamp Duties* [1934] A.C. 61. Nor, it is suggested, does this decision affect the possibility of the donor continuing to have some connection with the property, as in *L. A.* v. *Stewart* (1906) 8 F. 579 and *Att.-Gen.* v. *Seccombe* [1911] 2 K.B. 688. Further, where shares are parted with by a person previously in control of a company and a service agreement is taken by the donor from the company, it is suggested that the donor is still excluded entirely from the property given, *i.e.*, the shares, and in view of the provisions of Finance Act, 1940, s. 48, it is still preferable to enter into such service agreement after the gift of the shares and not prior thereto.

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5. *MISCELLANEOUS*

Green v. *Fibreglass, Ltd.* [1958] 3 W.L.R. 71; [1958] 2 All E.R. 521
Wells v. *Cooper* [1958] 3 W.L.R. 128; [1958] 2 All E.R. 527

Liability of occupiers to visitors—do it yourself—don't do it yourself.—In the first of these two cases, the defendants were the

occupiers of some offices and the plaintiff undertook the cleaning of them. The plaintiff sued for personal injuries as a result of burns caused by faulty wiring in the defendants' electrical installation. When the defendants became occupiers they had had the installation completely rewired by expert electrical contractors, and it was due to the negligence of one of their workmen that the wiring was faulty. The defendants, having no reason to suppose that the contractors were negligent or the installation unsafe, were held not liable.

In the second case, the plaintiff, a fishmonger, was delivering fish to the defendant occupier and was invited in to take a cup of tea. On leaving he pulled the backdoor to; the handle came off, and he fell, sustaining injury. The defendant was an amateur carpenter of some experience and had fixed the handle himself, using three-quarter inch screws instead of one inch screws as the plaintiff alleged he should have done. The Court of Appeal held that, whether the plaintiff was licensee or invitee, the defendant's duty was the same: to take reasonable care for the plaintiff's safety. The defendant had discharged this obligation, as it was reasonable for a man of his experience to have made the replacement and the degree of skill required was that which a reasonably skilled carpenter might be expected to apply to the work in question. It may be noted that, in effect, the trial judge rejected the expert evidence and came to a conclusion of fact which will commend itself to most persons.

Although neither of these decisions was under the Occupiers' Liability Act, 1957, they point the way to the likely approach to the Act. The Act (ss. 2 (4) and 3 (2)) makes specific provision with regard to independent contractors. If the occupier reasonably employs a contractor and reasonably satisfies himself that he is competent and the work properly done, he escapes liability. It is reasonable to repair a door handle oneself but not reasonable to wire premises unless one has electrical knowledge and experience. Salmon J. said of the electrical contractors (at [1958] 3 W.L.R. 74): "I find that this company was, and the defendants reasonably believed them to be, a long-established firm with a high reputation as electrical contractors. . . . Electrical wiring, however, is a matter for expert electrical contractors and is not ordinarily carried out by the occupier himself. How were the defendants to fulfil their duty to use reasonable care? I cannot think it was incumbent on them to send one of their directors or servants to a Polytechnic to take a course in electrical engineering and then attempt the rewiring themselves. In my view, they would discharge their duty of care by employing reputable and competent experts; and this they did. Nor had the defendants at any time thereafter any reason to suppose that the experts had been negligent, or that the electrical installation was unsafe."

In each case counsel for the plaintiff sought to say the job in hand should have been dealt with in some other way, so as to make the occupier warrant the safety of his visitor, but in both cases the courts decided that impossible burdens are not to be placed on occupiers.

Goodyear Tyre and Rubber Co. (G.B.), Ltd. v. *Lancashire Batteries, Ltd.* [1958] 1 W.L.R. 857; [1958] 3 All E.R. 7

Restrictive practice — Notices of condition — Restrictive Trade Practices Act, 1956, s. 25.—Under the Restrictive Trade Practices Act, 1956, s. 25, a supplier of goods may make a condition as to selling price run with the goods and bind a retailer if the retailer "acquires the goods with notice of the condition." The British Motor Trade Association circularised retailers (including the defendants) stating that products of certain manufacturers (including the plaintiffs) were subject to conditions as to the retail prices, details of which could be obtained from the manufacturers. The short point was: was this sufficient "notice of the condition" or should the circular have given express notice of the actual terms and conditions sought to be enforced, as was held by the learned judge at first instance? The Court of Appeal, applying the railway ticket cases of which we became so sick as students, held that the circular was sufficient notice to comply with the Act.

THE LIBRARY

Landlord and Tenant (Temporary Provisions) Act, 1958 (Current Law Guide No. 14). By Ashley Bramall, m.a., Barrister-at-Law, and Scottish Section by Ian C. Kirkwood, Advocate. London: Current Law Publishers, Ltd. 1958. xi and 120 pp. (9s. 6d. net.)

A new Act of only eight and a half pages on landlord and tenant conjures up the vision of hopeful practitioners, each with a Queen's Printer's copy under his arm, going home muttering to himself "I'll run through this after dinner," and finding instead, near midnight, that they must tie a wet towel round their heads and take a little something to help them sort out, say, the fate of a sub-tenant upon whom the tenant has served no notice under Schedule 4 of the Rent Act, 1957. But the dream is too good to be true. Few practitioners will read a new naked Act; most prefer guides, which are longer and more expensive. And in the case of the Landlord and Tenant (Temporary Provisions) Act, 1958, your reviewer (who is normally suspicious of guides) feels obliged to concede that the guide-addicts are for once right. As is well known, the purpose of the Act is to modify some of the effects of the Rent Act, 1957, and part of its difficulty or lack of straightforwardness stems from its habit of referring extensively to the Act of 1957 and other rent restriction legislation. But Mr. Bramall, in the guide under review, has done the valuable service of collecting all the relevant rules together in a shortish pleasantly readable narrative and discussing in (as might be expected) an authoritative manner a number of problems likely to be met with in practice. Mr. Kirkwood has appended a brief exposition of the Act's application to Scotland. In addition there are three appendices containing an annotated copy of the Act, relevant excerpts from earlier Acts (in which perhaps, for completeness' sake, section 12 (5) of the Increase of Rent, etc., Act, 1920, might have been included) and the Rent Restrictions Rules, 1957, as amended by the Rent Restrictions (Amendment) Rules, 1958. The book is well indexed and has tables of statutes and cases.

One small criticism of the text is that on page 14 the sense would be clearer if the first word on the second line were "each" instead of "that."

Out of a fund of helpful discussion two topics particularly intrigued your reviewer. As hinted above, the application of the Act to sub-tenants is not at all easy to deduce, but the author's analysis of the problem on pages 13 to 16 is most illuminating and labour-saving. The other matter (product perhaps of an afternoon's nap by the Act's draftsman) is mentioned on page 26, namely, the transmogrification of landlords and tenants into owners and occupiers respectively with insufficient reconciliation of terms used in the Act of 1958 with presumably-meant-to-be-corresponding terms in the Rent Act, 1957.

On two minor points of interpretation your reviewer feels dubious. The suggestion on page 4 that the Act will protect an occupier who has given up possession of his kitchen and shares one with the owner seems to go too far. Section 1 (4), it is thought, does no more than apply the Act to a part of a dwelling-house which was itself decontrolled under section 11 of the Rent Act, 1957 (provided, of course, that the other requirements of section 1 (2) of the Act of 1958 are fulfilled). Secondly, under section 3 (6) (a) the court cannot suspend execution of an order for possession if, among other things, the property is subject to an agreement for sale

or for the grant of a tenancy (signed before April 2, 1958) under which the owner is obliged to give vacant possession on "a date specified therein." The words quoted, the author suggests, mean that the obligation to give vacant possession on a completion date must be express. But it is submitted, in the light of *Hughes* v. *Jones* (1861) 3 De G.F. & J. 307 and *dicta* in *Cook* v. *Taylor* [1942] Ch. 349, that *where no reference is made in the contract to the existing tenancy* the obligation to give vacant possession *can* be implied. However, these criticisms are trifling and in no wise diminish the undoubted value of this book which more than accomplishes what it sets out to do. Non-guide-addicts, it is feared, will irreverently make their Queen's Printer's copies into paper darts.

B. S. K.

Money at Work. By Milton Grundy, M.A. London: Sweet & Maxwell, Ltd. 244 pp. (17s. 6d. net.)

Mr. Grundy has had an original idea, to make a survey of investment and consider the various ways in which hard earned savings can be put to work. After a lively chapter on the tax factor by the editor, the book is divided into two parts, one dealing with orthodox means of investments and the other with valuables, each chapter being written by an expert in his own field. The chapters vary considerably in quality from the one on banks, written, understandably anonymously, by a London bank manager—a chapter reading very much like the usual advertising brochure to be picked up in any bank—to Mr. John Carter's interesting and well-written one on the auction room. The lesson to be learned from the chapters on valuables is the perhaps obvious one, that works of art should be bought because they please and in that event may one day yield a handsome profit, but, if bought merely as an investment, may result in a thundering loss.

Whether the investor is likely to learn from the book anything new or valuable about investing is a moot point, but it is a pleasant change from law, and why should not even a pedestrian lawyer buy a book not as an addition to his orthodox library but to his valuables, *i.e.*, books bought because they please.

E. F. G.

The Estates Gazette Digest of Land and Property Cases, 1957. Edited by C. William Skinner, D.L., J.P., L.M.P.T.I., A.R.I.C.S., Barrister-at-Law. London: The Estates Gazette, Ltd. xii, 371 and (index) 4 pp. (£2 5s. net.)

This work is not a digest, but a collection of reports selected from the *Estates Gazette* for 1957. The reports are not intended primarily for the lawyer, but sometimes they fill gaps left by the more orthodox reports and help to clothe rapidly, if not always too modishly, the stark naked babies, whose paternity is generally doubtful, abandoned at birth on the doorsteps of the court-house by the Mother of Parliaments. The arrangement of the different sections is not by any means satisfactory. There are seven of them, one of which is entitled "Miscellaneous." There are to be found the Rent Act cases, but they are not grouped together, nor can they be sought out easily. The index does not include the heading "Rent Acts" or any similar heading, there is no table of statutes and the catchwords are not sufficiently helpful. "Rent Act of 1920, section 12 (1) (g)" is explicit enough, but "Mortgagees' summons for repayment," "Possession case," "Possession claim" do not put the reader onto the subject-matter quickly

enough. Either the sections should be properly arranged internally or the index should be improved.

The sections on compensation and compulsory purchase, development value and rating are of considerable value and the reporting of cross-talk at the end of the judgments in the style of *Tax Cases* often relieves the monotony of what has gone before.

In the case of an Act like the Landlord and Tenant Act, 1954, which earns a complete section of 45 pages, the textbooks are almost out of date before they leave the press and must be supplemented by as many cases (including those in the county court) as possible. It is on such a subject that the digest is of especial value. There are cross-references to the standard law reports.

J. H. G.

We have also received:

The French Law of Wills, Probate, Administration and Death Duties. By Pierre Pellerin, Licencié en droit, Barrister-at-Law, and Jean Pellerin, Licencié en droit, Barrister-at-Law. London: Stevens & Sons, Ltd. 68 pp. (7s. 6d.)—It is a quarter of a century since the third edition was published and half a century since the first edition. No sane English practitioner is likely to advise on French law, but often a client resides or has assets in France. When he comes to make a will or to die, it is useful and sometimes necessary to know the rudiments of the system governing his foreign assets. This book succeeds in covering the ground clearly and shortly so that the outline can be discerned very quickly. There is sufficient detail for the English lawyer to pick his path. An admirable little book.

Current Legal Problems, 1958. Edited by Professor George W. Keeton, m.a., ll.d., and Georg Schwarzenberger, ph.d., dr.jur. London: Stevens & Sons, Ltd. 304 pp. (£1 15s. net.)—This annual volume of public lectures delivered under the auspices of the Faculty of Laws of University College, London, has rather neglected conveyancing this year and the only lecture on subjects dealt with by this journal is Mr. Scamell's on "Trusts and Taxation," which is already partly out of date as a result of this year's Finance Act. Everyone interested in the future of the profession should read Sir Edwin Herbert's address on "Education for the Legal Profession." Sir Edwin is well aware of the economic difficulties ahead, especially for members of the bar, and his suggestions are kept strictly within the bounds of practicability. He believes in division of the two branches of the profession, not on the trite and untenable grounds usually put forward, but because—well, let the reader read for himself.

The Rent Act in Practice. Edited by N. D. Banks, Barrister-at-Law. London: The Solicitor's Law Stationery Society, Ltd. 100 pp. (15s. net.)—This is a volume of queries on the Rent Act, 1957, put up to the *Solicitors' Journal* with replies, properly arranged and edited, followed by a short appendix of eight pages on the Landlord

and Tenant (Temporary Provisions) Bill, as it then was. Although in theory the idea of taking actual points which have arisen and dealing with them is a good one, in practice it does not seem to work at all well. Even the most skilful arranging has not given the book coherence, and the considerable length of many of the questions makes the book hard going. This is not to say that the book does not give considerable help on numerous specific points, for it does, and the answers are fully reasoned with the relevant authorities supplied.